Office of Command Counsel Newsletter

June 2002, Volume 02-03

CLE 2002 Highlights: General Kern Addresses AMC Attorneys

The CLE 2002 was a success; that's what we think we are hearing from attendees. Several memorable plenary sessions were aligned with the CLE theme, **"AMC Attorneys: Supporting the Objective Force."**

This CLE was far different than any in the preceding 24 years: AMC Command Counsel **Ed Korte** was unable to attend due to illness. Deputy Command Counsel **Nick Femino**, Executive Officer **Holly Saunders** and CLE Committee Chair **Stave Klatsky** assumed additional responsibilities. A true team effort that ensured a smooth program.

It is always difficult to find people who have the knowledge, information and delivery on topics that support the CLE theme. This year we were fortunate for **COL William Johnson** who spoke on "Defining the Objective Force" and **LTC Jon Lockey** who described the "Objective Force Maneuver Unit of Action Concept". Both presentations were well received and the question and answer sessions added to the realization of what the objective force is, and the role AMC plays.

Two other exceptional plenary sessions concerned current issues: "Military Commissions" presented by **COL Paul Hutter** and Ethics and the Media by **Carol Knopes** of the Newseum.

Each year the perspective from the JAG Corps is presented. This year it was a pleasure to welcome **BG David Carey**, Assistant Judge Advocate General for Civil Law and Litigation.

General Kern addressed the attendees as part of the AMC Attorney Awards Program, and he focused our attention on the future--mission, organization and people.

Pat Emery from ARL Selected AMC Attorney of the Year

Details on the CLE Awards Ceremony inside

In This Issue:

Special CLE edition

Pat Emery, ARL Counsel, Receives the Joyce I. Allen AMC Attorney of the Year Award

It was an honor to have the AMC Commander, **General Paul Kern** address us and then remain to assist in the Command Counsel Awards Ceremony.

At the annual AMC Continuing Legal Education Program **Pat Emery** of the U. S. Army Research Laboratory (ARL) was selected as the recipient of the AMC Attorney of the Year Award for 2002.

Pat was recognized for his exceptional efforts in support of the ARL Collaborative Technology Alliances (CTA) program. CTA represents the follow-on to the hugely successful ARL Federated Laboratory (Fed Lab) program, another initiative in which Pat was a key architect.

Fed Lab received a Hammer Award last year and the CTA program was built on the success of that initiative.

These two programs represent an experiment in pursuing Army research and development needs by establishing a collaborative research environment to serve as the crossroads for scientist and engineers from Government, industry and academia.

Pat's acquisition expertise, his legal skills, and his willingness to provide guidance on the applicable business concepts make him a critical player in this important program.

The other nominees for the Joyce I. Allen Attorney of the Year Award are: **Pat Drury**, CECOM Acquisition Center-Washington; **Frank Faraci**, AMCOM; **Terese Harrison**, OSC; **Violet Kristoff**, TACOM-W; **Denise Scott**, TACOM-ARDEC; **John Seeck**, OCS.

Congratulations to all.

Newsletter Details

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Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

pecial CLE edition

COL Donna Wright, CECOM SJA Receives Francis J. Buckley, Jr. Managerial Award

COL Donna Wright, CECOM is the recipient of the Francis J. Buckley, Jr. Managerial Award.

COL Wright was recognized for her significant work in the aftermath of September 11 in handling new and unique legal issues, working with the Ft. Monmouth community and her own staff to provide outstanding legal advice, counsel and guidance, and providing leadership to the SJA Division.

Security operations were a critical component of the command's post September 11 mission.

Coordination with local law enforcement personnel created legal issues that were expertly addressed.

Reservists who came to Ft. monmouth received excellent briefings and required information from COL Wright and the team she managed.

COL Wright is an outstanding mentor for the military and civilian employees she manages.

Col Wright's planning of a recent Article 6 visit by a General Officer ensured visibility of several members of her office, giving each a significant contribution to a fine effort.

The other nominees for the Buckley Award are **Dave DeFrieze**, OSC and **Art Tischer**, AMCOM.

David Kuhn, TACOM IP Counsel is Preventive Law Award Recipient

David Kuhn from TACOM-Warren is the recipient of the AMC Preventive Law Award.

The Command Counsel legal practice philosophy is to anticipate the needs of our clients and to develop programs and initiatives to address those needs.

Mr. Kuhn developed an intellectual property guide for contracting officers and acquisition personnel, titled "Intellectual property: Navigating Through Commercial Waters." This was created in conjunction with the Undersecretary of Defense for Acquisition, Technology and Logistics.

To supplement the guide David executed an impressive array of preventive law notes, legal advisories and held seminars for clients.

The other AMC Preventive Law Award nominees are **Bruce Bartholomew**, AMCOM and **Maria Esparraguera** and **Jim Scuro**, CECOM.

pecial CLE edition

AMC Team Project Award Received by CPT Douglas Moore from AMCOM, Redstone Arsenal

The recipient of the AMC Command Counsel Team Project Award is the Redstone Tax Assistance Team chaired by **CPT Douglas Moore**.

During the first 8 weeks of operation the team that CPT Moore organized filed over 2,100 federal and state returns represeting over $1,000,000.

The free services provided saved clients over $155,000 in fees.

CPT Moore organized a team of military and civilian employees, some volunteers, ensured they were trained appropriately, established a campaign to inform the community of the tax service, and estabiahed office hours that provided maximum flexibility and convenience to the Redstone community.

In addition, the **CECOM Legal Office Emergency Acquisitions Team** was nominated for the Team Project Award.

George Worman Receives AMC Command Counsel Achievement Award

This award is presented to an AMC field counsel nominated by HQ AMC counsel. This year's recipient is **George Worman**, Anniston Army Depot. On many occasions the Command Counsel has called upon George to provide in house legal counsel on sensitive, complex and difficult legal issues. George is an expert litigator and employment law practitioner, able to quickly develop the litigation strategy. He executes this strategy in an exemplary way with sophisticated oral and written communication skills.

Acquisition Law Focus

GAO, Protests, A-76 and Conflicts of Interest

On 5 Dec 2001, the GAO sustained the Jones/Hill Joint Venture protests which challenged the Navy's determination pursuant to OMB Circ. A-76 that it would be more economical to perform base operations and support services in-house at the Naval Air Station, Lemoore, CA.

GAO sustained the protests on many issues, including significant conflict of interest concerns:

A Conflict of Interest existed because a Navy employee and a consultant wrote and edited the performance work statement (PWS) and then prepared the most efficient organization (MEO).

The Navy Independent Review Official's Certification that the government could perform was not supported by either contemporaneous documentation or hearing testimony.

Reconsideration

Upon the Navy's request for reconsideration GAO has modified its decision.

Now the conflict of interest rules will be applied prospectively from 10 Dec 01, the date that the Jones/Hill decision was released to the public.

If, on 10 Dec 01, an agency had already completed the PWS and invested substantial time and/or resources in preparing the in-house plan, GAO will not consider a protest ground alleging a conflict of interest based on the Jones/Hill decision.

In cases where the PWS has been started but there has not been substantial time invested in preparing the in-house plan, the GAO will consider a protest allegation that we failed to take steps to avoid or mitigate a conflict of interest.

If GAO decides that substantial time has been invested and, therefore, the conflict of interest rules cannot form a basis for protest, our action will be reviewed under the reasonableness standard.

POC is **Vera Meza**, Protest Litigation Branch Chief, DSN 767-8177.

List of Enclosures

Invention Reporting: Natick and NIH Sign MOU

The U.S. Army Soldier and Biological Chemical Command (SBCCOM) Soldier Systems Center (SSC) at Natick, MA has signed a Memorandum of Understanding (MOU) with the National Institutes of Health (NIH) Office of Policy for Extramural Research Administration.

The MOU provides administrative support for compliance with invention reporting, by grantees/contractors, as described under the Bayh-Dole Act of 1980 (PL 96-517).

The Bayh-Dole Act gives grantees/contractors a right to elect title to Federally-supported subject inventions as a means to better promote commercialization of these inventions subject to a Government license to use or have others use the invention for Government purposes.

Grantees/contractors must meet certain reporting milestones to ensure that inventions made with Federal support are commercialized.

A major thrust of the reinventing government initiative has been to streamline reporting procedures through the use of electronic transmission of information and the development of standard formats and reporting procedures across government agencies. Our business partners, the grantees and contractors, have also identified these goals as a high priority.

iEdison

To this end, the NIH developed Interagency Edison (iEdison), an electronic invention reporting and tracking system to assist the agency and grantees/contractors in timelier reporting of inventions arising from Federal support.

Reporting through iEdison simply and effectively allows grantees/contractors to comply with the law and improves the tracking of government rights. The administration of invention information in the iEdison database by NIH improves efficiency in a work environment that is often downsizing.

Considering the recent review by the GAO of the Army's practices in tracking invention reporting under contracts, the use of iEdison is a significant improvement to the contract oversight aspect of invention reporting requirements of grantees/contractors.

Free NIH Assistance

This assistance by NIH is provided at no cost to SSC or any collaborating agency. The MOU is based on the assumption that SSC has fewer than 200 inventions reported per year. The MOU will continue until either party notifies the other of termination, which may occur at any time by simply sending a letter to the other party.

Agencies of the Departments of the Air Force, Navy, Commerce and Agriculture, Fort Detrick of the Army's Medical Command, the Environmental Protection Agency, Food and Drug Administration, and National Science Foundation have signed on with NIH.

For more information contact Natick Counsel **Vin Ranucci**, DSN 256-4510

GAO A-76 Report Released and Discussed at CLE 2002

Dan Gordan, Chief of the GAO provided attendees with a summary of the recently released GAO A-76 Panel Report.

Dan shared his thoughts and led a spirited discussion on this important effort.

In response to a requirement in the National Defense Authorization Act for Fiscal Year 2001, the Comptroller General of the United States convened a panel of experts to study the current A-76 process used by the government to make sourcing decisions.

The Panel consisted of representatives from Federal agencies, labor unions, private industry and other experts.

The mission statement developed:

"The mission of the Commercial Activities Panel is to improve the current sourcing framework and processes so that they reflect a balance among taxpayer interests, government needs, employee rights, and contractor concerns".

The Panel adopted 10 Sourcing Principles

Federal sourcing policy should:

1. Support agency missions, goals, and objectives.
2. Be consistent with human capital practices, designed to attract, motivate, retain, and reward a high-performing federal workforce.
3. Recognize that inherently governmental and certain other functions should be performed by federal workers.
4. Create incentives and processes to foster high-performing, efficient, and effective organizations throughout the federal government.
5. Be based on a clear, transparent, and consistently applied process.
6. Avoid arbitrary full-time equivalent or other arbitrary numerical goals.
7. Establish a process that, for activities that may be performed by either the private or public sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles.
8. Ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible.
9. Ensure that competitions involve a process that considers both quality and cost factors.
10. Provide for accountability in connection with all sourcing decisions.

Employment Law Focus

Whistleblower Protection Under the Occupational Safety and Health Act

The OSHA provides some anti-discrimination protection for employees. Title 29, Section 660c(1) of the United States Code contains a provision that prohibits any person from discharging, or in any manner discriminating against, an employee because that party has exercised any right allowed under the OSHA to file a complaint (i.e. to report unsafe working conditions) or participate or testify in a related proceeding.

Other DOL Authority

Along with what are traditionally thought of as "safety issues" under the OSHA, the DOL also has the authority under 29 CFR 24 to investigate complaints of employer retaliation for "whistle blowing" under the following statutes: the Safe Drinking Water Act, the Water Pollution Control Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, the Clean Air Act, the Energy Reorganization Act, and the Comprehensive Environmental Response, Compensation and Liability Act.

Reprisal complaints pertaining to potential violations of the above statutes can be filed within 30 days at the nearest Occupational Safety and Health Administration office.

Possible reprisal for reporting violations of the above statutes is investigated in the same manner by the DOL as possible reprisal for reporting potential violations of the OSHA (Encl 1)

ADR Use on the Rise in EEO Complaints at OCI

Comparing statisitcs on ADR use by the DOD Office of Complaints Investigation reveals a sharp increase in the use of ADR.

FY 00

Cases Using ADR=704
Resolved by ADR=497
Cost Avoidance=$30-117 million

FY 01

Cases using ADR=874
Resolved by ADR=650

Cost Avoidance=$39-117 million

The success rate increased from 70% to over 74%

Employment Law Focus

EEOC Issues Final Rule on ADA and the Federal Workforce

The U.S. Equal Employment Opportunity Commission (EEOC) announced on May 21, 2002 the publication of a final rule to clarify the application of the employment provisions of the Americans with Disabilities Act of 1990 (ADA) to federal government workers.

"These changes to the Commission's regulations will promote consistent enforcement of the Rehabilitation Act of 1973 and Title I of the Americans With Disabilities Act of 1990," said EEOC Chair Cari M. Dominguez. "They will also promote the goal of increasing the employment of individuals with disabilities in the federal government and ensure that the federal government continues to serve as a model employer of individuals with disabilities."

A complete copy of the announcement is at Enclosure 2.

Agencies Will Pay for Discrimination Out of Own Pockets-Not Judgement Fund

President Bush signed legislation yesterday that is designed to hold federal agencies more accountable for acts of discrimination or reprisal against their employees.

It requires agencies to pay — out of their budgets — for settlements and judgments against them in discrimination and whistleblower cases.

Most settlements and awards in favor of federal employees who sue agencies in discrimination cases have been paid from a government-wide Judgment Fund.

In addition, the law requires agencies to file reports with Congress and the attorney general on tcase histories, including discipline taken and money expended.

A complete copy is at Enclosure 3.

Unions and the Department of Army

There are 377 collective bargaining agreements within Army covering approximately 94% of the bargaining unit employees.

Of those agreements, 40 are multi-unit involving 100 units; only 45 units and 4,707 unit employees are not covered.

Of the 126,786 employees, there are 90,149 (71%) white-collar (including 13,233 professionals) and 36,637 (29%) blue-collar employees.

There are 6,435 (4.8%) fewer bargaining unit employees and 23 (4.6%) fewer bargaining units compared to Jan 99.

A complete listing of data including the 24 different labor organizations that represent Department of Army employees is at Enclosure 4.

Environmental Law Focus

TIM--Q and A Fact Sheet

The Transformation of Installation Management (TIM) is an initiative to centralize installation management within the Army.

The purpose of this initiative is to improve management efficiencies and standardize the quality of services that soldiers can expect as they move between installations.

The TIM will be structured to have the Installation Management Agency (IMA) direct overall Army installation management operations. Regional offices will manage execution functions for all Army installations and garrisons within a geographical area.

According to the Q&A sheet, one of the tenets of the TIM plan is to minimize work force turbulence. The Army expects little, if any, changes in manpower at the installation level (See Questions 20-23).

Additional information is provided in the enclosure Q&A Sheet (Enclosure 5).

ELD Discusses Compliance, Litigation and more

On 16 May 2002, the Army Environmental Law Division held a very informative workshop on the latest environmental law developments. The workshop topics included:

Compliance Topics

- New DA PAM 200-1
- CAA Sovereign Immu nity Update
- Fort Wainwright Update
- Water Issues Update

Restoration/Natural Resource Topic

- Langley Air Force Base LUC Dispute
- LUC Implementation

Litigation Update

- Litigation Reports
- SIAD OB/OD Lawsuit
- Fort Richardson Litigation
- Fort Huachuca ESA Decision

AEC Update

- "Presidential Regulations" Update
- The Migratory Bird Treaty Act: *Waking a Sleeping Giant!*

(Enclosure 6).

Online Federal Environmental News

This is a computerized, subscription-based information service operated by the EPA's Office of Enforcement and Compliance Assurance, Federal Facilities Enforcement Office. Subscribers to this free service will receive environmental news and information of interest to federal facilities.

To subscribe, send an email message addressed to listserver@unixmail.rtpnc.epa.gov. Leave the subject line blank, and in the body of the message write: subscribe FEDENVIRONEWS-ONLINE firstname lastname (e.g., subscribe FEDENVIRONEWS-ONLINE john doe).

Please follow the spacing and case parameters in the example. In separate text below your address, please indicate your federal agency, and/or state in which you are affiliated or located.

For further information, please contact Marie Muller, EPA,at muller.marie@epa.gov.

Environmental Law Focus

DOD Land Use Control Documentation Guidance

DOD and EPA at Impasse

The Department of Defense (DoD) and Environmental Protection Agency (EPA) are at impasse regarding documentation of land use controls (LUC) in clean up records of decision (ROD).

On 4 June 2002, DoD issued guidance to try to resolve this impasse. Under the guidance, the installation should continue to follow the DoD position that LUC implementation information (e.g. periodic monitoring, inspection reports, etc.) is not included in the ROD.

While EPA is expected to disagree with this approach, if their only disagreement involves LUC implementation documentation, the installation should note this disagreement in the ROD and indicate that the ROD may be amended in the future based upon final resolution of the DoD/EPA policy level disagreement.

As long as EPA concurs with the underlying physical remedy, the installation "may and shall unilaterally issue and execute the ROD respecting those elements of the physical remedy".

The DoD guidance also includes useful model ROD and transmittal letter language.

A copy of the DoD guidance and letter forwarding the guidance to EPA is provided at Enclosure 7 and Enclosure 8.

DoD Environmental Management System (EMS) Policy.

On 23 April 2002, the DoD issued a press release announcing the availability of an EMS policy memorandum.

The memorandum directs DoD components to adopt an EMS and work to integrate it in all core business areas. Components may adopt ISO 14001.

Although not required, DoD components are encouraged to implement a complementary management system for safety and occupational health.

The policy memo is available at https://www.denix.osd.mil/denix/Public/Library/EMS/Documents/dodems-040502.pdf.

For further information, please call (703) 428-0711, or public@defenselink.mil.

Ethics Focus

OGE Raises the Exemption on Stock Ownership

Effective 18 April 2002, $5000 no longer will be the correct answer. The correct answer will be: D. $15,000. Long awaited, On April 18, 2002 the Office of Govenment Ethics' (OGE) proposed regulatory change to raise the exemption amount for stock ownership has now been published as a final regulation that takes effect on 18 April 2002.

The prior rule had an exemption of $5,000. This change elevates the amount to $15,000.

For purposes of applying the exemption, the employee must aggregate his or her stock ownership with stock owned by someone whose financial interests are imputed to him or her—spouse and minor children.

Mutual Fund Ownership
OGE has also established an exemption amount for ownership of sector mutual funds.

A sector mutual fund is a mutual fund that concentrates its investments in an industry, business, single country other than the United States, or bonds of a single State within the United States.

The exemption amount for sector funds is $50,000.

There already is a blanket exemption for diversified mutual funds. A diversified mutual fund is one that does not have a stated policy of concentrating its investments in any industry, business, single country other than the United Statees, or bonds of a single State within the United States.

POC is Bob Garfield, AMC Ethics Team Chief, DSN 767-8003. (Enclosure 9)

Tips, Bars, Restaurants, NAF and Appropriated Fund Employees

Bob Garfield provides an excellent analysis written by **Bruce Esnor**, concerning 18 USC Sec 209 which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee.

Both appropriated fund and non-appropriated fund employees whose primary occupational duties do not customarily and regularly involve tips, or involve government contracting, restaurant management, supervision of employees or other fiduciary duties are prohibited under 18 U.S.C. § 209 from soliciting or accepting tips as a "contribution to or supplementation of salary".

A great analysis on an interesting issue is at Enclosure 10.

LEXIS CORNER

Using People Locators and Public Records for, due diligence, background information, litigation and investigative research.

LexisNexis offers the most extensive collection of public records information available. Drawn from 1,100 sources, nearly 1.5 billion individual and business records and growing continually, LexisNexis public records include:

- person locators
- business locators
- real property records
- personal property records
- business and corporation information
- judgments and liens
- civil and criminal court filings
- verdicts and settlements
- licenses

You can use it in a host of applications. Here are just a few examples:

- simplify due diligence on entities you do business with,
- locate elusive parties, witnesses, defendants, judgment debtors, child support obligors, pension beneficiaries, heirs, and others
- track ownership of assets

find bankruptcy history

- verify facts such as license status and history, a company's exact name, and so on
- trace an individual's business affiliations
- review Secretary of State filings
- gather intelligence on an individual on business.

Several sample searches are identified in the much prettier version of the Lexis Corner at Enclosure.

Contact **Corrin Gee** at 800-253-4183 X78236 or **Rachel Hankins** X78258

Lexis at CLE 2002

Thanks to **Rachel Hankins** and **Coreen Gee** for their CLE 2002 contributions, and their active participation in the Legal Focus Sessions.

Faces In The Firm

AMC Senior Counsel and Office Chiefs Set to Retire

At CLE 2002, we took a moment to recognize the exceptional serice of two veteran AMC Counsel who have led their respective offices, Both have announced their retirements.

Bob Spazzarini

The Chief Counsel of AMCOM for the last 5 1/2 years retires shortly. Bob has over 38 years of government service, over 36 with AMCOM and its prior command--MICOM, at Redstone Arsenal.

Bob led AMCOM through a remarkable period, with the merger of the AMC legal office in St. Louis with Huntsville's legal community.

Raised in Connecticut, Bob received his BS and LLB from Georgetown University, Washington, DC. He also attained a masters degree in Public Administration from Harvard.

Bob exhibited a professional demeanor through the many significant actions he worked or managed over the years. So many AMCOM and AMC counsel have learned acquisition law from Bob, as well as how you can show leadership in a quiet and dignified manner.

Les Renkey

The Chief Counsel of the Blue Grass Army Depot for over 29 years-that says it all. Les exhibited exceptional ability to adapt to the vast changes in the practice of law at a Depot.

Labor and Employment Law, Environmental Law, specific issues such as sexual harassment, personal liability, conflicts of interest are just a few of the legal disciplines that arose during these three decades.

Les handled these mission changes with rare professionalism.

Les received his BA from Notre Dame, was an Army Infantry Officer, received a law degree from the University of Kentucky, and attended his first AMC CLE in 1974.

Arrivals

Beverly Fisher has joined the STRICOM Legal Office as a Paralegal Specialist. Beverly came from the Human Resources Mgmt. Division.

Welcome **Kelly L. Daniel, "Lisa",** Associate Counsel. Lisa is a Navy employee who works on Army programs. Lisa comes to us from Peterson AFB, Colorado, where she was assigned as an Air Force JAG.

Departure

Jim Savage has announced that he will be retiring this year, and his service at Natick (and before that at Watertown, Mass) was recognized at the CLE. Jim has been with AMC for 16 years. He served his country well as an infantryman with combat service in Vietnam.

Public Service Award

TACOM-RI Paralegal **Gail Fisher** received a Lifesaving Award from the American Red Cross in a TACOM-RI Town Hall meeting. She did the Heimlich maneuver on K Krewer who was choking on a piece of popcorn.

As K says "While some people might argue that saving the life of a lawyer is not really a public service, I was very glad that she was here!"

Whistleblower Protection under the Occupational Safety and Health Act (OSHA)

Introduction:

The OSHA provides some anti-discrimination protection for employees. Title 29, Section 660c(1) of the United States Code contains a provision that prohibits any person from discharging, or in any manner discriminating against, an employee because that party has exercised any right allowed under the OSHA to file a complaint (i.e. to report unsafe working conditions) or participate or testify in a related proceeding.

Violations of 29 USCS 660c(1):

There are two main bases for violations. The Supreme Court, in Whirlpool Corp. v. Marshall, 100 S.Ct. 883 (1980) held that while there is no general right afforded by the OSHA to allow employees to walk off the job because of potential unsafe conditions, an employee may have that right to do so if the employee justifiably believes that the express arrangement for complaining about unsafe working conditions does not sufficiently protect them from death or serious injury. An employer's discharge or reprimand of an employee under the above circumstances is considered discriminatory and in violation of 29 USC 660c(1). Also, an employer who reprimands or discharges an employee who makes a report of a potential OSHA violation (or anything pertaining to unsafe working condition) may be violating the anti-discrimination provision of the OSHA. Employers who are found to discriminate under this statutory provision may be liable for reinstatement, back pay and other forms of relief.

Procedures for Filing a Complaint:

The regulations contained in 29 CFR 1977 provide the specifics on how to file a complaint with the Secretary of Labor at the nearest Occupational Safety and Health Administration office. Generally, the employee or their representative may file a complaint within 30 days after a potential discriminatory action occurs. The 30 day filing requirement can be tolled in some cases where there is evidence of deception on the employer's part or where the employee is using a grievance procedure (such as an administrative grievance procedure or collective bargaining procedure) to dispute the basis for the adverse action.

Once a claim has been filed, an administrative investigation may be initiated. Then, a hearing might be requested by the Department of Labor (DOL) or by the employer. At the hearing, the employer has the opportunity to submit exculpatory evidence that the adverse action was taken for a legitimate reason and not in retaliation for a protected disclosure of a potential OSHA violation. During the hearing, the employee making the complaint retains the burden of persuasion, by the preponderance of the evidence, to show that the protected disclosure played a role in the employment

decision. The employer must show that they would have reached the same employment decision in the absence of any protected disclosure.

Behavior Constituting a Violation:

Examples where the courts found violations of the anti-discrimination provisions of 29 USCS 660c(1) are provided below:

a. Employees who were fired for refusing to step out on a wire mesh screen guard suspended above the plant floor because the screen guard had given away in previous instances and several employees had been injured or killed. Whirlpool.

b. An employee who was fired for refusing to load lead scrap into a melting kettle using a pay-loader without a windshield or enclosed cab because of the potential for an explosion caused by alleged defects in the kettle. Marshall v. N.L. Industries, 618 F.2d 1220 (7th Cir., 1980).

c. A pet store employee who was fired for reporting a potential health hazard to the OSHA ("parrot fever"). Marshall v. Commonwealth Aquarium, 611 F.2d 1 (1st Cir., 1979).

d. Four employees who were fired after repeatedly filing grievances over safety related issues that were not corrected at their worksite. Donovan v. Freeway Construction Co., 551 F.Supp. 869 (D.R.I., 1982).

e. Three machinists who were fired following their complaint to the OSHA regarding the improper ventilation of fumes during welding. Donovan v. Peter Zimmer America, Inc., 557 F.Supp. 642 (D.S.C., 1982).

In the above cases, the employees were treated sufficiently differently than their colleagues for the courts to find a nexus between their termination and the protected activity (i.e. filing a complaint or refusing to work in imminently dangerous conditions).

Additional Authority of the DOL:

Along with what are traditionally thought of as "safety issues" under the OSHA, the DOL also has the authority under 29 CFR 24 to investigate complaints of employer retaliation for "whistle blowing" under the following statutes: the Safe Drinking Water Act, the Water Pollution Control Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, the Clean Air Act, the Energy Reorganization Act, and the Comprehensive Environmental Response, Compensation and Liability Act. Reprisal complaints pertaining to potential violations of the above statutes can be filed within 30 days at the nearest Occupational Safety and Health Administration office. Possible reprisal for reporting violations of the above statutes is investigated in the same manner by the DOL as possible reprisal for reporting potential violations of the OSHA.

FOR IMMEDIATE RELEASE
May 21, 2002

Contact: Ann Colgrove
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(202) 663-4900
TTY: (202) 663-4494

EEOC ISSUES FINAL RULE ON APPLICATION OF ADA STANDARDS TO THE FEDERAL WORKFORCE

New language in the EEOC Regulations on the Rehabilitation Act of 1973 applies employment nondiscrimination standards of the ADA to federal government employees

WASHINGTON - The U.S. Equal Employment Opportunity Commission (EEOC) today announced the publication of a final rule to clarify the application of the employment provisions of the Americans with Disabilities Act of 1990 (ADA) to federal government workers.

"These changes to the Commission's regulations will promote consistent enforcement of the Rehabilitation Act of 1973 and Title I of the Americans With Disabilities Act of 1990," said EEOC Chair Cari M. Dominguez. "They will also promote the goal of increasing the employment of individuals with disabilities in the federal government and ensure that the federal government continues to serve as a model employer of individuals with disabilities."

When Title I of the ADA (employment provisions) was enacted, some of the legal requirements of the ADA differed from the Rehabilitation Act, even though the two laws shared the same purpose: ending employment discrimination based on disability. Congress subsequently amended the Rehabilitation Act, applying the ADA standards to federal employment.

This final rule implements the amendments to section 501 of the Rehabilitation Act and updates the EEOC's Rehabilitation Act regulation in 29 C.F.R. § 1614.203. Final rule highlights include:

- The final rule incorporates by reference the EEOC's ADA regulation, at 29 C.F.R. Part 1630.
- The regulatory limits on reassignment of federal employees with disabilities as a reasonable accommodation, formerly included in 29 C.F.R. § 1614.203(g), have been deleted, and the ADA standard will now be applied.
- The final rule amends the federal sector disability regulation, 29 C.F.R. § 1614.203, and sets forth the obligation of the federal government to be the "model employer of individuals with disabilities."

The application of the ADA's nondiscrimination standards has no impact on federal affirmative action obligations or programs.

EEOC published a Notice of Proposed Rulemaking (NPRM) on the amendments to its old section 501 regulation in the Federal Register on March 1, 2000. The Commission subsequently received 15 comments. They included comments from federal agencies, federal unions, advocacy groups representing persons with disabilities, one from a group representing employment attorneys and one from a state agency. After careful consideration of the comments, EEOC approved the revised final rule in accordance with the federal rulemaking process.

The text of the final rule and other information about the EEOC is available on the agency's web site at www.eeoc.gov. In addition to enforcing the Rehabilitation Act of 1973's prohibitions

against disability discrimination in the federal government, the EEOC enforces the employment provisions of the Americans with Disabilities Act, which prohibits employment discrimination against people with disabilities in the private sector and state and local governments; Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin; the Age Discrimination in Employment Act; the Equal Pay Act; and sections of the Civil Rights Act of 1991.

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Making Agencies Pay The Price Of Discrimination, Retaliation

President Bush signed legislation yesterday that is designed to hold federal agencies more accountable for acts of discrimination or reprisal against their employees.
The new law will hit agencies in their pocketbooks, according to proponents.
It requires agencies to pay -- out of their budgets -- for settlements and judgments against them in discrimination and whistle-blower cases. Most settlements and awards in favor of federal employees who sue agencies in discrimination cases have been paid from a government-wide Judgment Fund.

In addition, the law requires agencies to file reports with Congress and the attorney general on the number of complaints filed against them by employees, the disposition of each case, the total of all monetary awards charged against the agency and the number of agency employees disciplined for discrimination or harassment.

The law directs agencies to post on their Internet sites "summary statistical data" about the numbers and types of equal employment opportunity complaints filed against them.
The legislation's chief sponsors were Reps. F. James Sensenbrenner Jr. (R-Wis.), Sheila Jackson Lee (D-Tex.) and Constance A. Morella (R-Md.) and Sen. John W. Warner (R-Va.).
The House, by a vote of 412 to 0, sent the measure to Bush on April 30 after Senate approval on April 23.

"No longer will discrimination and retaliation be swept under the rug and considered an inconvenience for working at a federal agency," said Sensenbrenner, chairman of the House Judiciary Committee. "By holding accountable those who insist upon discriminating against others, the federal government will become a role model for civil rights -- and not civil rights violations."

During the Senate debate, Warner hailed the measure as "the first civil rights bill of the new century" and predicted that it would "create a more productive work environment by ensuring that agencies enforce the laws intended to protect federal employees from harassment, discrimination and retaliation for whistle-blowing."

The legislation grew out of a House investigation two years ago into what Sensenbrenner aides called a disturbing pattern of intolerance, harassment and discrimination at the Environmental Protection Agency. During the probe, federal employees at other agencies complained of similar problems.

Among those who had pushed for the legislation was Marsha Coleman-Adebayo, an EPA employee who was awarded $600,000 in 2000 by a Washington jury in a federal race and sex discrimination case against the agency. A judge later reduced the jury award to $300,000.
The legislation -- the Notification and Federal Employee Antidiscrimination and Retaliation Act, or "No FEAR" -- alters a long-standing practice that permitted agencies to avoid the costs of

settlements and judgments in bias cases. Congress created the Judgment Fund to avoid having to approve specific appropriations for such legal costs and, in theory, to allow for prompter payment.
Under the new law, agencies must reimburse the fund for settlements and judgments. Because some judgments might leave agencies short of cash, the law allows for a "reasonable time" to reimburse the Judgment Fund and says agencies may extend repayments over several years to avoid layoffs or furloughs.

The General Accounting Office reported that in fiscal 2000 agencies paid about $26 million in discrimination complaint settlements and judgments. In the same period, the Judgment Fund paid out about $43 million more in such cases.

UNION RECOGNITION IN THE DEPARTMENT OF THE ARMY

Union	Employees Represented	Bargaining Units	Units Under Agreements
American Fed of Government Employees	78,583	249	223
National Fed of Federal Employees	18,941	66	62
Nat'l Assoc of Government Employees	12,304	49	45
Int'l Assoc of Machinists & Air Wkrs	3,897	25	25
Int'l Fed of Profess and Tech Engineers	3,648	16	11
Laborers Int'l Union of N. America	2,695	9	7
Service Employees Int'l Union	2,324	4	4
Metal Trades Council	891	3	3
Int'l Assoc of Fire Fighters	760	24	23
Int'l B'hood of Electrical Workers	694	9	9
United Power Trades Organization	490	1	1
Panama DoD Employees Coalition	400	1	1
International Brotherhood of Teamsters	288	2	2
National Maritime Union	205	6	6
Int'l Org of Masters, Mates & Pilots	144	1	1
Fraternal Order of Police	113	5	3
Marine Engineers Beneficial Assoc	93	2	2
Plumbing and Pipefitting Ind of the U.S.	83	2	2
Congresso de Uniones Ind de Puerto Rico	80	1	1
Int'l Brotherhood of Police Officers	73	3	2
Int'l Guard Union of America	34	1	1
Int'l Chemical Workers Union	20	1	1
Int'l Association of Tool Craftsmen	17	1	1
Federal Fire Fighters Association	9	1	1
	126,786	482	437
Appropriated Fund Employees:	114,798	435	392
Nonappropriated Fund Employees:	11,988	47	45

There are 377 collective bargaining agreements within Army covering approximately 94% of the bargaining unit employees. Of those agreements, 40 are multi-unit involving 100 units; only 45 units and 4,707 unit employees are not covered. Of the 126,786 employees, there are 90,149 (71%) white-collar (including 13,233 professionals) and 36,637 (29%) blue-collar employees. There are 6,435 (4.8%) fewer bargaining unit employees and 23 (4.6%) fewer bargaining units compared to Jan 99.

Data as of Jan 01.

QUESTIONS AND ANSWERS:

1. **What is the name of the centralized installation management initiative?**

Transformation of Installation Management (TIM).

2. **Didn't this initiative used to be called CIM - Centralized Installation Management? Why the name change?**

The change to "TIM" recognizes that the management of installations is a critical part of the Army transformation vision. Transforming installation management is an integral part of Army transformation.

3. **How does TIM enhance Army transformation?**

TIM is another facet of the Army's move to streamline its operations to become more efficient and responsive in meeting a wide range of missions. It will achieve this by creating the structure to focus on requirements and assets specifically aimed at supporting mission accomplishment. By doing business smarter, it also furthers the Army's long-standing programs to enhance the Well-Being of soldiers and their families. It enables the development of multi-function installation management to support evolving structure and needs. It also provides maximum management flexibility through a geographic focus, instead of the current functional focus.

4. **Where does TIM fit into Army transformation?**

TIM enables and supports mission commanders by improving the delivery of support services to them and by freeing them from day-to-day installation management.

5. When will transformation take place?

The first phase of Transformation of Installation Management will be completed by October 1, 2002. Transformation of Installation Management will be completed by October 1, 2004.

6. Why October 2002? Why is this being rushed?

The planning for TIM began more than a year ago. It is not a new topic. Establishment of the Oct. 1st milestone is just part of the planning to ensure continued momentum in making this important structural change to the Army as an institution.

7. How will this centralized management system be structured?

The U.S. Army Installation Management Agency (IMA) will direct overall Army installation management operations. Regional offices will manage execution functions for all Army installations and garrisons within a geographical area. Three of the regions will be OCONUS, in Europe, Korea and the Pacific. The four proposed regions for CONUS align with current federal regions (federal emergency management agency, environmental protection agency and U.S. Army reserve regional support commands). These regions are balanced by total number of installations (20-26 each) and number of active component installations (16-20 each). (Each region will have a regional director located within the region.)

8. What are the regions going to do for us? What are their functions? Has regionalized installation management ever been tried in the past?

Centralizing installation management into regions will provide for a more streamlined funding flow. By centrally managing installation functions, the Army can better standardize the level and quality of services that soldiers can expect as they move between installations. In addition, any savings generated from management efficiencies can be used to provide increased buying power for installation purposes.

We are managing installations this way in Europe right now through a system of base support battalions and area support groups. The intent was to free the warfighter from day-to-day installation management responsibilities so that he/she can fully focus on the combat mission. This management system proved its worth during military operations in Bosnia. Our regional model is patterned on this success story.

9. **If it's already like this in Europe, will anything change with the establishment of the headquarters in Heidelberg?**

Currently the U.S. Army, Europe headquarters is directly involved in installation management, though its subordinate tactical units were relieved of those responsibilities in the early 90s with the creation of their area support group and base support battalion structure. TIM will now place the responsibility for senior level oversight with the regional headquarters. Positions now at the USAREUR headquarters that deal with installation management will be transferred to the regional headquarters. As at the other locations, the staffing and work of the regional headquarters there will continue to be reviewed and refined in the next few years to streamline operations.

10. Are there going to be regional or installation priorities?

There will be priorities at all levels. However, the purpose of TIM is to achieve standard levels of service at all installations.

11. **Draft plans showed six CONUS regions - why the change? Who decided how the regions would be divided? Why?**

Four CONUS regions are more economical and more streamlined. The four CONUS regions align with current federal regions, which are used by the federal emergency management agency, the environmental protection agency and U.S. Army regional support commands. These regions are balanced by total number of installations and by number of active component installations. Each region will have a regional director, whose headquarters will be located within that region. Three regions will be located OCONUS: in Europe, Korea, and the Pacific. The regional headquarters will be based at:

1.Northeast: Fort Monroe, Virginia
2.Southeast:Fort Mcpherson, Georgia
3.Northwest: Rock Island Arsenal, Illinois
4.Southwest: Fort Sam Houston, Texas
5.Europe: Heidelberg, Germany
6.Pacific: Fort Shafter, Hawaii
7.Korea: Yongsan, South Korea

(open map of regions)

Region Map
(10Apr02).ppt

12. After many years of working toward improved installation management, why do we still have to go through further reorganization?

Establishing a corporate structure is the only way to ensure the desired consistency and equity in the delivery of installation management services. The corporate structure insulates installation management and mission funding from each other and provides increased predictability for both.

13. How will Reserve and National Guard sites be affected?

Management of the Army Reserve's Installations and reserve centers will be integrated into the transformed installation management structure over time. Reserve installations will be managed as a separate function. Although the elements of the Army National Guard staff will be integrated with the IMA at HQDA, Army National Guard sites are not included in the transformed installation management. This is due, in part, to the unique funding associated with the National Guard in each state and the guard's management of both state and federal facilities.

14. What overall impact on Army resources do you expect TIM to have?

The purpose of the Transformation of Installation Management (TIM) is to improve installation services, support and management by creating a corporate structure, the Installation Management Agency (IMA). The IMA focuses on installation management and relieves mission commanders from the day-to-day operation of Army installations.

While it is premature to quantify specific savings, the Transformation of Installation Management will achieve efficiencies inherent in centralization and standardization. There will be a reduction in management layers, and there will be fewer installation management headquarters than the 14 land-holding MACOMs engaged today. Creating a structure that ensures funds are allocated and expended as originally programmed will provide for efficient execution. And finally, this new structure will enhance the effectiveness of the Army because it is designed to support mission accomplishment.

An important outcome of the Transformation of Installation Management is the provision of consistent and equitable services and support from installation to installation, and amongst the

various units and activities on an installation. This consistency is the result of a single IMA structure establishing and enforcing installation standards Army-wide. The current deteriorating state of installation services across the Army, when sorted out and standardized, will provide savings but will require an initial implementation period of several years.

The establishment and centralization of installation management acquisition will aid the process of standardization while at the same time provide for savings by leveraging the Army's buying power with large quantity equipment and service purchases. This advantage is enhanced by the geographical alignment of the IMA structure. As an example, within the state of Texas, installations are currently managed by four separate major commands. Under the new IMA structure, a single regional office will be able to negotiate state-wide contracts within the state of Texas and across the entire Southwest.

15. **Is TIM the first step toward eliminating MACOMs?**

No. MACOMs are essential to conduct the Army's business of training, equipping and preparing soldiers for warfighting missions. By removing the burden of day-to-day installation management from mission commanders, TIM will further focus them on their readiness mission. It was never intended to be the opening step in eliminating MACOMs.

16. Do you really expect regional directors to visit all installations?

Yes, just as MACOM commanders and staff now visit all the installations in their commands, regional directors and staff will visit all installations in their regions. Additionally, we expect routine visits by MACOM staff.

17. Several Generals have said, "I don't care what TIM says on paper-I'm still in charge of the garrison." Realistically-who will say otherwise?

The current Commanding Generals will still be the senior rater for the garrisons commanders. This will provide an integral link to the mission. While funds, standards and programs will come to the garrisons through the IMA structure, Mission Commanders will still provide oversight to assure the mission is supported and people are taken care of.

18. **When will the MACOMs receive the HR plan?**

The plan is currently under development. That plan should be distributed in early June.

19. Is there a move to take the garrison CPAC and put it into a personnel stovepipe?

The DA G-1 plan proposes a centralized organization. There has been no final decision on this proposal. A decision is expected shortly.

20. Will there be job losses at the installation? If so, how soon?

The Transformation of Installation Management should not result in job losses at the installation level at this time.

21. I hear the words "minimize personnel turbulence" used in conjunction with TIM. Are the decision makers really looking out for the workforce?

Yes. The stability of the workforce is a top priority of the TIM implementation Task Force and the leadership. In transforming, the decision to capitalize the work force in place ensures minimal impact on employees. This will also give management ample time over the next two years to ensure needed skills are in the right location. Any initial geographical moves will most likely be voluntary.

22. How will workforce capitalization work? Will region/IMA/FOA positions be competed fo so everyone has a chance at the jobs?

O*n 1 Oct 02, the above installation level work force transferred to the IMA regions will stay where they are or move to a nearby location. Volunteers will be sought to move to regional headquarters locations. Then vacancies will be recruited. As a new organization and function, the IMA headquarters will be staffed through recruitment.*

23. Will the Transformation of Installation Management force me to transfer to a different installation or lose my job?

One of the tenets of the TIM plan is to minimize work force turbulence. We expect little, if any, changes in manpower at the installation level. We plan to transfer employees at their current geographical location and in their current job and grade.

Provisional regional installation management directorates will be created from MACOM staffs who are currently engaged in installation management functions. Staffs will be organized during this fiscal year (FY02). That may provide opportunities for installation management employees to volunteer to move to another location where there are staffing shortages. For FY 03, we envision a "virtual" management structure (where the organization can operate with employees working from various locations) at the headquarters and region levels. This will be created by realigning expertise currently in place.

Because this is a totally new organization, the Installation Management Agency Headquarters will be recruiting Army-wide. This will not involve a transfer of function since installations have never been managed before from a central agency.

As the manning of the regional headquarters is refined, every effort will be made to match personnel with employment opportunities in other regions to further minimize any impact on current employees. All moves will be made based both on employee qualifications and mobility.

24. What differences will surrounding communities notice as a result of centralized installation management?

The change should be transparent to the surrounding communities. They will work with the same people on the installation that they always have interacted with in the past.

25. How do you propose to manage installations if the major commands no longer have direct oversight?

The Installation Management Agency (IMA) will assume many of the "housekeeping" functions of the MACOMs. The IMA structure will provide policy, direction, and resources matched against approved standards sufficient for installation managers to deliver consistent and predictable services to all customers. An implementation plan will outline responsibilities, chain of command authorities and customer relation procedures prior to implementation. This will include procedures for Major Commands to express command unique requirements.

26. What methodology did you use in determining what resources would be transferred from the MACOM organizations performing installation management functions above the installation level?

First, we sent a memo to MACOMs asking them to do this. However, time did not permit the normal evaluation, submission, review, and negotiation process necessary to ensure consistency. So we reviewed the latest approved authorization documents of MACOMs, command field operating agencies, and major subordinate commands performing installation management functions. Second, we identified those positions clearly performing installation management functions based on the organizational titles of directorate, division, branch and office paragraphs within the manning documents and individual job titles. In the MACOM functions where the amount of workload/work years related to installation management was indiscernible--we took a portion of the spaces based on the ratio of BASOPs funds to OMA funds spent by the MACOM.

27. Were there any exceptions to the use of the BASOPs/OMA ratio to identify the number of installation management positions on the MACOM staffs?

Yes, in order to take a conservative approach to moving MACOM staff spaces we applied a ratio of OMA BASOPs to MACOM total obligation authority (TOA) for Military District of Washington (MDW), Army Materiel Command (AMC), and Army Test & Evaluation Command (ATEC). This was because the other ratio produced an ordinately high number of spaces to move.

28. Are all Army elements/commands included in TIM?

Yes. Some installations, such as those funded by Working Capital Funds and the Defense Health Program, will not be immediately moved under the command and control of the Installation Management Agency because of differences in funding and the nature of their mission. They will, however, get their management direction and standards from the TIM structure.

29. What methodology did you use in determining what resources would be transferred from the installations and garrisons to the new Installation Management Agency (IMA)?

We transferred all resources, both manpower and dollars, that resided in the installations PEG with base support Special Activity Groups (SAG) and MEPS at the time of the FY 03 president's budget submission for OMA, OMAR and AFHO.

30. Did you transfer any resources other than those connected with the Transformation of Installation Management (TIM) initiative?

Yes, part of the SecArmy initiatives were the centralization of both contracting and information technology (IT). At their request, we also transferred the installation level resources supporting those functions. The Headquarters Installation Management Agency (HQ IMA) will act as a banker for these resources, until the new contracting and it organizations are stood up and prepared to receive these funds. At that time, the fund control for the installation contracting and it resources will be transferred. No resources at echelons above installation level were transferred to TIM for these two functions.

31. Will MACOMs have an opportunity to regain resources that may have been transferred erroneously, for whatever the reason?

Yes, during the FY 04-09 POM build, a reclama/compare process has been used to resolve any differences concerning the resources transferred under TIM.

32. What is the effect on Army Management Headquarters Activities (AMHA)?

The majority of the spaces realigned from the MACOMs to staff the regions and IMA Headquarters will be AMHA spaces. Final decisions on the structure and staffing of the new organization are not yet complete, therefore the impact on AMHA is not yet certain.

33. What impact will this have on the A-76, commercial activities decision authority?

The reorganization will require us to realign the A-76 decision authority. We intend to develop a concept that speeds up the process and brings resolution to employee concerns more quickly.

What impact does this have on ongoing A-76 studies?

A-76 studies are conducted at the installation level, therefore we expect all current studies to proceed as scheduled.

34. How will this reorganization affect ongoing environmental cleanup and other environmental programs at installations?

All current environmental efforts should continue as planned. We do not anticipate any delays in ongoing environmental projects as a result of this reorganization. If anything, due to the direct manner in which installations will receive funding and due to the ability of installations within the same region to work consistently in partnership with regulators in that region, we eventually expect to see a more efficient, expedient means of handling environmental issues at installations.

35. What are the mechanisms for identifying installation support requirements and issues to HQDA?

Installations will identify their requirements/support issues to their regional office. The regional office will review those requirements/issues, combine them with other similar issues for that region and forward them to the IMA Headquarters where they will ensure that these requirements/issues are reviewed, validated and addressed in the appropriate funding cycle.

36. How will the TIM initiative affect Army Working Capital Fund (AWCF) installations?

Due to the complex funding process and in most cases, small installation level staff AMC will retain command and control of AWCF installations. However, guidance, standards and reporting of installation management processes will use the IMA structure. This will be examined in detail in FY03 to determine the best end-state arrangement.

37. Will there be different work measures or metrics for installations based upon their differing command and/or appropriation missions?

Since one of the primary goals of TIM is to provide a consistent, standard level and quality of soldier support across all Army installations, the metrics will naturally have to be outcome-oriented. Differences in geographical locations, environmental issues, mission requirements and OCONUS cultural and political considerations can reasonably be expected to place differing operational requirements upon installations to meet the same outcome. The IMA headquarters will work with HQDA functional proponents and with regional directors to create output-oriented standards for diverse installations and balance the funding across those standards to ensure consistency Army-wide.

38. The Secretary of Army spoke of a new accounting system using information technology. Will this be a new government-specific system (like CPOC's *"modern"*) or will it be a windows-based, customer-friendly system?

Phase I of TIM will be supported by existing Army accounting legacy systems (STANFINS, SOMARDS, CFFMS, SABRS, SIFS). When new accounting systems near fielding readiness, advance information will undoubtedly be disseminated via DFAS and Army financial information channels.

39. Who will provide guidance for those installations, which have not been included in phase I of TIM?

All installations are included in TIM 1 October 2002. Command and control for some installations will remain with the MACOM. The USAIMA will provide guidance on installation management issues. MACOMs will provide guidance on the command and control issues.

40. What mechanism/methodology will be used to calculate dollars for approved manpower being returned to the MACOM?

Pay dollars were returned at the PB03 rate - the same rate used during the initial transfers. If an entire program is being returned, all non-pay dollars for that program were returned. Otherwise non-pay dollars were returned one percentage basis tied to the amount of manpower returned.

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42. Will BASOPs funding targeted toward MEDCOM for medical facility support remain with MEDCOM or will it transition to TIM?

In FY95, RPM/SRM funding for medical facilities on installations transferred to the Defense Health Program that will continue to be managed by MEDCOM.

43. Do range and airfield operations fall under TIM or the mission commander?

These functions will fall under the Installation Management Agency (IMA).

44. What basis will be used to determine the funding level (%) for BASOPs?

The percentage level of funding is determined by two main variables: 1) the dollar level of validated BASOPs requirements and 2) the amount of total Army funding prioritized against BASOPs programs.

45. One of the slides at the initial session of the Army Garrison Commander's Conference listed an issue titled "Restructuring NAF Financial Management & Accounting System." Is an Army One fund being considered?

The MWR BOD reviewed several options for NAF financial management under TIM. One option was a single Army garrison fund. That may be the answer at end-state, but the preferred option at this time is to establish separate region funds at each region.

46. Who will arbitrate conflicting points of view in FY03 if MACOMs are to receive BASOPs funding?

Although TIM funding will flow to the MACOMs in FY03 for financial administration and fund control, the IMA resources will be provided on FADs completely separate from the MACOMs' mission funds. The IMA FADs will be tagged as IMA command (not the MACOM command). Base support and Army Family Housing Operations Resources will be fenced, with the regional directors providing the installation funding allocation and distribution guidance.

47. Will the regional directors require roll up of services for buying power?

Operational decisions impacting garrisons/installations within a region will be made using better business practices (e.g. "city management") where feasible. Regional management personnel will review installation operations under their purview to identify where management efficiencies can be applied consistent. They will focus on management's mission to provide consistent, high-quality support to soldiers and their families. Therefore "roll up" purchasing decisions should be viewed on an issue-by-issue basis instead of on a mandated operational process.

48. After TIM implementation, am I still the installation commander? And if so, what's changed for me?

Yes, installation commanders remain responsible for taking care of soldiers and their families. As the senior mission commander, they are responsible for setting and maintaining unit policies and prioritizing mission related MILCON. Installation commanders remain the senior installation representative to elected officials, the public and other stakeholders. Installation commanders are responsible for performing UCMJ/ GC, and finally, they are still responsible for protecting the force.

TIM will enable installation commanders to focus on core Army missions while the garrison commander provides all services that are common to residents of the installation. They will be responsible for senior rating the garrison commander and for participating in installations master planning (short-term and long-term priorities, major and minor construction (APF/NAF), and privatization initiatives).

49. Will civilians who are employed on installations lose jobs?

No. At the installation level the change should be virtually transparent to most of the community. Even at the MACOM level, we've chosen to capitalize-in-place the work force. That is, for the first two years, we're committed to minimize personnel turbulence and ensure every worker currently engaged in installation management has a job.

50. If there is disagreement in guidance between the installation commander and the garrison commander or regional director, how will that get sorted out?

The regional team at HQ IMA will arbitrate the disagreement and resolve guidance issues. The garrison commander has a tough job. His rater and his senior rater will not be in the same chain of command. But as an 05 or an 06 commander, that's part of the job. From the region, he will be receiving guidance on Army-wide service standards. If that conflicts with the desires of the installation commander, the obvious first step is a dialog with the regional director. If that doesn't resolve the issue, it gets elevated to the headquarters of the Installation Management Agency (IMA). But understand, your senior MACOM commanders will be part of the installations Board of Directors. The BOD will be setting or approving the general Army-wide guidance that our regions and garrisons will be implementing.

51. Who will advise/provide guidance/support channels for those installations that are not part of TIM (AWCF) for BASOPs functions (DPW/ log etc…) MCA projects up through regions/ command channels?

All installation management functions at all installations will be assumed by TIM. No installations are exempt from TIM; therefore, advice, guidance and support for these functions will come from the proponent through the HQ IMA to the regions and installations.

52. **Will TRADOC retain the installation doctrine mission? If not who?**

Actual writing of the doctrine will be discussed further. But as TRADOC is responsible for management of overall doctrine in the Army, they will be involved.

53. MG Van Antwerp said minimal moves at the garrisons. Someone needs to tell installation commanders, senior mission commanders and their staffs to stop what they

are doing because moves reallocation of space and "lining up ducks" is occurring now in a "pre-decisional" mode. Who is going to stop this and pull things back?

The premise, from the beginning, is that the impact at the garrison level would be relatively transparent. Those installation services provided before 1 October 2002 continue. As a result of the space and resource moves to implement TIM all of those manpower spaces belong to the IMA regardless of any local reallocations. Additionally those positions now belong to the IMA regardless of current or interim organization. Any changes to TDA documents must be approved by the DA G-3 who scrutinizes them carefully for TIM implications and consults with ACSIM.

54. How does contracting relate to TIM? (funding and operational control?)

Contracting is one of three Army-wide functions being centralized, along with installation management and network management. All contracting, both mission and installation support, is being centralized for the following activities: FORSCOM, TRADOC, and the Military District of Washington. Installation contracting to support the U.S. military academy is also being studied for inclusion. The Army contracting agency will also perform installation contracting for designated AMC and MEDCOM installations. Contracting personnel in organizations being aligned with the Army contracting agency will be centralized on the Army contracting agency TDAs. At the installation level, the staff of the installation contracting office, commonly known as the DOC, will provide matrix support to the garrison commander, who will be in the rating chain of the DOC, to support installation management mission (in the same manner that PM/PEO support is currently provided by AMC acquisition centers. Attached are nominal organizational charts and a map of geographic locations.

55. I have heard there is a FAR change which requires firm, fixed price contracts for all BASOPs contracts. Do you understand that this will significantly increase administrative burden or decrease flexibility in BASOPs contracting?

FAR part 37 - service contracting, requires the use of performance-based contracting to the maximum extent practicable (37.102(a)(1)), and identifies an order of precedence for contracts starting with firm-fixed price performance based contracts (37.102(a)(2)). 37.101(3) defines a service contract to include base services. This was introduced in FAC 97-25 on May 2, 2001 in the interim rule for FAR case 2000-307, preference for performance-based contracting. The interim rule is being converted to a final rule by FAC 2001-07 dated April 30, 2002 with no changes in FAR part 37. Part 7.105(b)(4) will be amended, however, to require the provision of a rationale in the acquisition plan if other than a performance based, firm fixed price basis.

Theoretically, firm fixed price contracts require less administration and less involvement and management by both DFAS and DCAA than cost reimbursable contracts. However, for that to be fully realized, the government must have an adequate statement of work (SOW), and be willing to live within the parameters of performance the SOW produces. Writing such a SOW

does, however, increase the level of effort to ensure the SOW is adequate. The true impact is increased work and collaboration before award to ensure the SOW is sufficient and adequate to support a FFP bid from industry.

56. With centralization of contracting, will we retain a dedicated KO at installation level to support responsiveness of the BASOPs contract?

Yes. The local installation contracting offices will retain sufficient personnel to perform the required pre-award and enhanced post-award contract administration. This will include dedicated contracting officer support where they currently exist.

57. **Will family housing be affected by TIM?**

There will be little change in family housing management.

58. I understand the ACSIM position will not be upgraded to a 3-star. This is the wrong signal to send to the field like the Army leadership is not really supporting TIM.

The Army is limited by both law and custom in the number and grade of general officers. Executive branch and congressional oversight is especially tight at the more senior grades. This is in essence a zero-sum process. All general officer positions are reviewed and must be justified annually. This review and justification are done at the most senior levels of Army leadership. Previous suggestions to "up-grade" the ACSIM to 3-star rank have foundered on the fact that there has been no 3-star position to offer up in trade, though such an upgrade has been a long-term goal of the ARSTAF and secretariat. While this may change as the Army transition process matures and the responsibilities of the ACSIM become more apparent, for the immediate future, the ACSIM will remain a 2-star position.

59. **Are there any checks and balances by DA to verify that MACOMs are not hiding civilian or military positions or moving them from the TDA before TIM goes into effect**?

The Installation Management Agency (IMA) will become the largest Field Operating Activity (FOA) in the Army. Nearly 75,000 personnel, military and civilian, appropriated and non-appropriated, from headquarters to garrison, will comprise this new organization. The 1 October 2002 stand-up of the IMA will entail the largest personnel change within the Army in at least a generation. Because of the size of the change, and the relatively short time in which to achieve it, some very general assumptions and some sweeping actions were taken. There wasn't time to go line-by-line through every TDA and make careful decisions on each space moved into the IMA.

In December 2001, PBD 715 directed a "sweep" of manpower spaces from the MACOMs into the new organization. We reviewed MACOM TDA's and included what we felt were the

appropriate manpower spaces in the "sweep." At the installation level we relied on BASOPs coding to capture the right spaces. As a result, some "mistakes" were made or identified. There had obviously been spaces that had been miscoded in the past. The reclama process was designed to allow MACOMs to recover spaces that had been taken. But the process put the responsibility on the MACOM to justify the return of spaces taken. In addition to ACSIM personnel, HQDA functional proponents reviewed the MACOM requests. This resulted in the return of some spaces and the acquisition of some additional spaces.

This was not perfect but we believe we achieved the 90% solution. Those positions now belong to the IMA regardless of the current or interim organization. Additionally, any changes to TDA documents must be approved by the DA G-3 who scrutinizes them carefully for TIM implications and consults with the ACSIM.

60. I thought the military district of Washington would remain its own region? What has changed?

We had to make some tough decisions to ensure efficiencies throughout the program and we could not justify separating the military district of Washington (MDW) installations as a separate region. The installations supporting MDW will become part of the northeast region.

61. I hear the U.S. Army Corps of Engineers will be taking over installation management for the Army. Is this true and how will this impact their civil works mission?

There are no plans for the U.S. Army Corps of Engineers to be assigned the responsibility for installation management for the Army. The corps will continue in the support role it has always carried out.

62. Will the TIM implementation give me the chance to move to a different installation if I want to? How about moving to a regional headquarters?

Yes. Should vacancies exist at either installations or regions, employees will be able to move voluntarily or they will be able to apply for jobs under normal merit promotion or career program procedures.

63. How will the "green-suiters" be affected?

At the installation, the transition of military positions is expected be transparent. Soldiers may wear a different unit patch to reflect assignment to the new Installation Management Agency.

64. Someone told me that once the new installations and regions have my slot on their TDA they could do what they want with it. (Change grades, career fields, etc.) Is that true?

It is TIM's intent to organize the current work force with minimal adverse impact on employees jobs. Adjustments to the work force structure above the installation level may be necessary in FY 03 and 04 to ensure the correct mix of skills at the correct locations. There is no guarantee grades will remain the same in the future as we fully transform installation management.

65. **What are my chances of being RIF'ed because of TIM?**

There is no Reduction In Force planned in conjunction with TIM. Full transformation will occu over a period of two years. It is expected that normal attrition and volunteers who will choose to take advantage of opportunities to move geographically to those regions where new vacancies exist will facilitate a smooth transformation.

66. How will the individual mission areas (logistics, personnel, training, resource management, etc.) Work under TIM?

The TIM process is still maturing, and many soldiers and civilians are working diligently to devise the best, most effective solutions. In general, management direction will flow from department of the Army proponents through the regional headquarters to the garrisons. The significant change is the command and control of garrison personnel, which now shifts from 14 Major Army Commands to the Installation Management Agency.

67. I have heard that TIM will not affect some organizations immediately. How come?

Some installations, such as those funded by Working Capital Funds and the Defense Health Program will not be immediately moved under the command and control of the IMA because of differences in funding and the unique nature of their mission. They will, however, get their management direction and standards from the TIM structure.

68. I am in a job where I do both MACOM and installation missions. Who will make the decision where I will wind up working?

Leaders from MACOMs, installations and the DA staff are currently carefully analyzing missions and position descriptions to determine which positions will remain at the MACOM and which will realign to the regions. Federal civil service regulations will determine individual placements of incumbent employees who will be notified through appropriate chains of command if their job is affected.

69. If it's a money problem, why didn't you simply fence the money?

The Army leadership explored several proposals to improve installation management. Our senior leader decided to go beyond just fencing dollars. So yes, we are fencing the money, but there is much more to this project. This is a way to focus on installation management and take advantage of regional efficiencies and improved business practices. As an example, within the

State of Texas, the Army has installations currently managed by four separate MACOMs. If we choose to negotiate a state-wide utility contract, we'll now speak with one voice. In dealing with the EPA or with FEMA, we'll have one Army installation voice.

70. Is the next step civilianizing the garrison commanders?

No, it's not in the plan. We recognize the unique nature of military communities and the advantage of a military officer as the garrison commander. However, I would say that our professional civilian workforce produces trained city managers who currently serve as deputy to the garrison commanders and are fully capable of stepping into the job.

71. Aren't we going to improve installations at the expense of mission readiness? After all, it is a zero-sum game - your gain is someone else's loss.

In one sense, yes - the Army's budget is fixed each year by Congress. We must live within that limit. However, the current practice of moving funds back and forth among different missions is inefficient. This new structure will dramatically reduce "with-holds" that create shortages early in the year and spending surges at year-end. And yes, it will force the Army to take a hard look at ensuring different programs are adequately resourced.

72. What is the plan to transition major activities from the MACOM to the region? Good MACOM support is tailored to a specific installation with a potentially different twist than another MACOM. Projects underway that will span the fiscal year (privatization of utilities, RCI) and are on a path crafted with significant MACOM input will require some structure for transition to keep projects on path.

We have formed Regional Task Forces to begin analyzing these situations to ensure a smooth transition to regional management.

73. **Part of the reason we need TIM is because the MACOMs continually goofed up installation ops. If that is true, and I think it is, why would we hire regional directorates from within MACOMs? Isn't that like telling a failed corporate president he can be in charge at even more?**

TIM Task Force leadership does not agree that MACOMs "goofed". In fact, they believe the opposite. It is well documented that there has been limited resources provided to MACOMs to manage installations under their purview. The fact that they have still accomplished their missions is a tribute to their management style and innovation. Currently, MACOMs are tasked to meet all missions with known shortfalls in budget. The intent of the new structure is to address these issues at the HQDA level to ensure corporate decisions are being made on behalf of all soldiers, civilians and their families. We will be a better Army for this.

74. **When will garrison commanders have an opportunity to provide input to the plan/TDA moves (proposed or otherwise)?**

We recognize that garrison commanders have a particularly challenging job. We don't want to increase the burden on you, but we do appreciate your insights and input. At various times, and in various forums, we've already been taking the pulse and receiving input from garrison commanders and their deputies. In addition to the Garrison Commanders' Conference, we've brought in serving garrison commanders on a number of occasions to give our planning a "reality check."

During the "compare process," when MACOM reclamas to the PBD 715 "taking" of manpower spaces were presented, the Transformation of Installation Management (TIM) side was bolstered by the presence of a colonel garrison commander. He was able to provide insight into who does the actual work, and how it is accomplished at the garrison.

When a number of the difficult "key decisions" -- particularly challenging disagreements between the ASA (I&E)/ACSIM view and the view of others on the ARSTAF -- were discussed with the Director of the Army staff (DAS) and the Deputy Under Secretary of the Army (DUSA) in preparation for presentation to the senior Army leadership, two serving garrison commanders, in Washington to assist with implementation planning, were present to give a commander's perspective.

The list goes on. Now that Regional Task Forces have been formed to complete the difficult detailed work of planning the transition for each of the seven regions, you have a direct means of providing input into the process. The Regional Task Forces needs your input to plan for the special situations and requirements of your garrison and installation.

Summary of Senior ELS Workshop
(16 May 2002)

1. Compliance Topics

a. **New DA Pam 200-1 (MAJ Liz Arnold)** – The new DA Pam 200-1, para 15-7 outlines key reporting/coordination requirements for environmental enforcement actions. Specifically, the ELS should –

(1) Determine validity of allegations;
(2) Identify disputed facts and defenses (if any);
(3) Preserve the installation's right to a hearing;
(4) Get a realistic compliance plan; and
  (a) If a fine is involved – review penalty calculations,
  (b) compare fine with regulator's policy and identify economic business/size of business penalty criteria (if any),
  (c) identify possible SEPs,
  (d) negotiate lowest possible fine,
  (e) keep the MACOM/ELD in the loop during settlement talks, and
  (f) all environmental agreements must be coordinated with ELD prior to signature.

Note – ELD is updating the **Criminal/Civil Liability Handbook** and hopes to have it out later this Summer.

b. **CAA Sovereign Immunity Update (LTC Charles Green)** - DOJ has determined that we can pay State CAA fines except in the 11th Circuit (i.e., Florida, Alabama, and Georgia) provided (1) the settlement agreement includes a statement that the payment does not constitute a waiver of sovereign immunity and (2) the settlement agreement is approved by ELD/DOJ. This should allow us to avoid the extended disputes that we previously experienced with State CAA fines.

c. **Fort Wainwright Update (LTC Jackie Little)** – On 30 April 2002, EPA's Chief ALJ issued a decision on the Fort Wainwright "business penalties" case. The ALJ concluded that economic benefit (EB) and size of business (SOB) may be taken into account in adjusting civil penalties in federal facility enforcement cases. The ALJ supported this decision by redefining EB to include: Non-monetary benefits, funds that do not generate income, and increased "budgetary flexibility". The Army is appealing this decision to EPA Environmental Appeal Board (EAB).

d. **Water Issues Update (LTC Jackie Little)** - The following CWA developments were discussed:

- **Arsenic Rule** – the final rule lowers the MCL for arsenic in drinking water from 50 to 10 parts per million and requires compliance by 23 Jan 06. This rule will impact several Army water systems.
- **Revised National Wide 404 Permits (NWP)** – the revised NWP requires a permit if there will be a loss of _ acre or less of wetlands, loss of 300 linear feet or less of streambed, and notification to District Engineer if loss of greater than 1/10-acre of wetland (See NWP #39: Residential, Commercial, and Institutional Developments).
- **SWANCC Sequel** – Last year, the Supreme Court held that the COE lacks regulatory jurisdiction over "isolated, non-navigable" waters based solely on the presence of migratory birds. Several environmental groups are drafting legislation to "reinstate federal control" in these cases but Congress is not likely to take up CWA legislation this session.
- **Pesticide/Herbicide Application** – An appeals court held that a NPDES permit is required before applying an aquatic herbicide to an irrigation canal that was a "water of the U.S.". Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001).

2. Restoration/Natural Resource Topic

a. **Langley Air Force Base LUC Dispute (Kate Barfield)** – The Air Force and EPA are intensively debating how land use controls will be enforced at NPL sites. The latest Air Force proposal involves stipulated penalties for certain LUC oversight activities (e.g., annual reports). There are varying degrees of support/non-support for this proposal from the other Services. At this point, it is not clear if the Langley LUC dispute will be resolved and, if so, to what extent it will apply to other military installations.

b. **LUC Implementation (Stan Citron)** – The issue of institutional control (IC) implementation is a growing concern at active and transferring installations. The below table summarizes various IC implementation strategies that are being considered at AMC installations:

Active Installations	Transferring Installations
No deed restrictions	Deed restrictions
Deed notices – maybe	Deed notices
Installation Master Plans · GIS Map · Site Approval Process · Excavation permits (if applicable)	Zoning · Industrial zoning · Well Field Program · Building permits/Miss Utility Program
Notices – publicize ICs in post newspaper, etc.	Notices – provide annual IC notice to LRA.
Employee Training – potentially	Self-certification – generally not

very useful	accepted by transferees
Fences/Warning Signs	Fences/Warning Signs
Monitoring – · Incorporate monitoring into IRP · Report land use changes and significant violations	Monitoring – · Incorporate into gw remediation program · Report significant IC violations
Annual Inspections – · Inspection should not unduly burdensome · Scope – Are IC mechanisms working? Any IC violations?	Annual Inspections – · Promote IC awareness by continued oversight · Army may delegate inspection responsibility.
Five Year Review	Five Year Review

3. Litigation Update

a. **Litigation Reports (COL Craig Teller)** – The Army ELD Litigation Division is likely to request more litigation reports in the future. The litigation report provides the starting point for defending cases and bringing claims on behalf of the government. In addition, it provides the installation an opportunity to advocate its view to DA/DOJ. A detailed description of litigation report requirements is set forth in AR 27-40, Chapter 3.

b. **SIAD OB/OD Lawsuit (COL Craig Teller)** – An environmental group challenged SIAD's open burning/open detonation (OB/OD) operations based on alleged violations of various environmental laws (e.g., RCRA, NEPA, ESA, and CAA). The case was settled after the Operations Support Command (OSC) agreed to limit SIAD OB/OD to emergency operations and OB/OD for national security reasons. The lawsuit had the following lessons:

- NEPA Ongoing Activities – The general rule is that NEPA is not required for the continued operation of a facility. However, DOJ was concerned that the 1995 expansion of SIAD OB/OD operations was a major federal action which triggered additional NEPA analysis.
- NEPA Functional Equivalence Doctrine – The functional equivalence doctrine recognizes issuance of RCRA permits by EPA as a functional equivalent of NEPA. During the SIAD OB/OD RCRA permitting process, an analysis was conducted under the State NEPA law. However, DOJ will not advocate extending the functional equivalent doctrine to other agencies for policy reasons.
- Importance of Local CAA Regulations – The county air pollution regulations incorporated language that could be interpreted to limit OB/OD to situations where there is no safe alternate method of disposal. This created another avenue for challenging SIAD OB/OD operations.
- RCRA No Safe Alternate Requirement – The RCRA interim status regulations allow OB/OD of waste explosives "which cannot safely be disposed of through other

modes of treatment". This raises significant questions regarding to what extent OB/OD will be limited due to the advent of safe alternatives to OB/OD.

c. **Fort Richardson Litigation (LTC Tim Connelly)** – A lawsuit involving Fort Richardson has raised the following issues: (1) Does military training indirect fire into waters of the US require a NPDES permit?, (2) Is UXO a CERCLA hazardous substances?, and (3) Is UXO a RCRA solid waste subject to abatement as an imminent and substantial endangerment. On the first issue, the Army filed a NPDES permit application for the Fort Richardson training range operations. The Army intends to litigate the CERCLA and RCRA allegations.

d. **Fort Huachuca ESA Decision (CPT Chin Zen Plotner)** – The Army is appealing a federal district court decision that a USFWS no jeopardy biological opinion was arbitrary and capricious and that the Army violated its duty to ensure that ongoing military activities do not cause jeopardy to endangered species.

4. AEC Topics

a. **"Presidential Regulations" Update (Colleen Rathbun)** – The decision to seek a NPDES permit for Fort Richardson training range operations may have significant ramifications since 80% of the Army ranges have navigable waters or are connected to navigable waters. Under the CWA Section 1323a, the President may issue regulations exempting from CWA requirements "any weaponry, equipment, . . or other classes or categories of property, . . . owned or operated by the Armed Forces and which are uniquely military in nature" if it is in the paramount interest of the U.S. The AEC is working on a proposal for development of regulations implementing this exemption.

b. **The Migratory Bird Treaty Act: *Waking a Sleeping Giant!?* (Scott Farley)** – A federal court recently held that Navy bombing operations on a remote Pacific island violated the Migratory Bird Act and issued a preliminary injunction enjoining all live fire operations. Center for Biological Diversity v. Pirie, Civ. No. 00-3044 (EGS) (D.D.C. 2002). This decision raises questions about the need to obtain a permit for training (e.g., operating tanks, firing into impact areas, etc.) and land management (prescribed burns, timber harvests, etc.) operations which may result in an unintentional taking of migratory birds.

STANLEY R. CITRON
Associate Counsel
30 May 2002

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

JUN 4 2002

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY, AND OCCUPATIONAL HEALTH)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ENVIRONMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(ENVIRONMENT, SAFETY, AND OCCUPATIONAL HEALTH)
STAFF DIRECTOR, ENVIRONMENT AND SAFETY,
DEFENSE LOGISTICS AGENCY SUPPORT SERVICES
(DSS-E)

SUBJECT: Interim Guidance on Environmental Restoration Records of Decision

The purpose of this memorandum is to clarify documentation requirements for remedial actions, to include specifically those containing land use restrictions, in Records of Decision (RODs) required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). General guidance on documenting the remedy decision is contained in paragraph 23.1 of the September 28, 2001, Management Guidance for the Defense Environmental Restoration Program (DERP). More specific guidance that Components should consider on the appropriate content of RODs is contained in the U.S. Environmental Protection Agency (EPA) Office of Solid Waste and Emergency Response (OSWER) July 1999 guidance document 9200.1-23P, A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents.

Using the CERCLA framework, DERP employs a risk management approach to take necessary and appropriate response action to protect human health and the environment from unacceptable risk(s) resulting from past contamination. When remedial action is taken, it must be documented in a ROD as required by CERCLA and its implementing regulation, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This requirement fully applies to remedies that have a use restriction component. The DoD as the lead agency has the obligation to move expeditiously through the cleanup process to address risks to human health and the environment. To facilitate this progress, Components are to follow this guidance to finalize and issue RODs.

All RODs need to focus on the risk and action(s) selected to address risk. Thus, the ROD needs to clearly:

- describe the risk(s) necessitating remediation;
- document risk exposure assumptions and reasonably anticipated land uses;
- state the remedial action objective(s);
- describe the remedy in general terms, specify the components of the remedy, and basis for the selection; and
- list the entity(ies) responsible for implementing and maintaining the selected remedial action.

These elements are consistent with the guidance contained in the DERP Management Guidance and OSWER 9200.1-23P.

In cases where use restrictions are selected as part of the remedy to address risk and exposure to any remaining residual contaminants, use controls are employed to manage the future use of the property. Where this type of use control is an integral component of the remedial action, the ROD (as stated in the OSWER guidance) needs to generally describe:

- the remedial action objective(s) of the use restrictions;
- the specific controls proposed to effectuate the restriction(s) "(e.g., deed restrictions such as easements and covenants, deed notices, land use restrictions such as zoning and local permitting, ground-water use restrictions, and public health advisories)";
- the area/property covered by use restriction and associated control(s);
- the duration of the control(s), if not permanent; and
- the "entities responsible for implementing and maintaining controls (e.g., property owner, town zoning authority, State health agency)."

These elements are consistent with the guidance contained in DoD's January 17, 2001, Policy on Land Use Controls (LUCs) Associated with Environmental Restoration Activities. Use controls must be identified and described in the ROD only when selected as remedial components necessary to protect human health and the environment from unacceptable risk. In addition, a Component may voluntarily choose to implement supplemental physical, legal, or administrative measures that reinforce the selected use controls, as addressed in DoD's March 2, 2001, Guidance on Land Use Control Agreements with Environmental Regulatory Agencies. These supplemental measures may be documented in voluntary agreements, non-enforceable arrangements, and internal documents, all of which normally would be included in the information repository for the site. However, such supplemental measures shall not be included in the ROD or any post-ROD enforceable documents. Examples of supplemental measures that are not to be included are:

- provisions for periodic monitoring or visual inspections of use restrictions and controls (other than CERCLA five-year reviews);

- certifications and reports to regulators associated with monitoring or inspections; and
- requirements for land use control implementation or assurance plans.

The April 23, 2001, DUSD(I&E) moratorium memorandum precluding Components from entering Federal Facility Agreements (FFAs), or modifying existing FFAs, that include Land Use Control Assurance or Implementation Plans, Operation and Maintenance Plans, Remedial Action Completion Reports, Site Closeout Reports, Five-Year Reviews, or any other similar post-ROD documents remains in effect pending resolution of current discussions between DoD and EPA. Similarly, the May 25, 2001, DUSD(I&E) clarification letter that states this moratorium also preclude including such documents, plans, reports, or reviews as an enforceable term, condition, provision, requirement, or deliverable in an FFA, ROD, or other similarly enforceable arrangement remains in place.

While finalizing a ROD, should a Component encounter regulator demands to include in RODs, or other post-ROD enforceable documents, provisions that conflict or deviate from DoD policy and guidance, the issue(s) shall be immediately elevated within the Component. We are working with EPA at a policy level to resolve differences in legal and policy interpretations. In general, if the only substantive disputes are the supplemental land use restriction and control issues or other post-remedy implementation, maintenance, completion or review provisions, then you should note in the ROD and Responsiveness Summary the nature of the dispute and that the ROD may be amended at a later time based upon resolution of the policy-level disagreement. As long as the Component can establish that EPA does concur with the underlying physical remedy, the Component may and shall unilaterally issue and then execute the ROD respecting those consensus elements of the physical remedy. Attached are model language and statements to be included in such ROD documentation. The elevation of and any dispute related to such specific use restriction and control, or other post-remedy issues, should not and must not be allowed to impede execution of those remedial selection and ROD elements for which there is agreement. My point of contact for this matter is Mr. Shah A. Choudhury, at (703) 697-7475.

John Paul Woodley, Jr.
Assistant Deputy Under Secretary of Defense
(Environment)

Attachment:
As stated

Model ROD documentation language acknowledging policy-level disagreement:

The [Component] acknowledges that the US EPA maintains specific provisions respecting [inspection, monitoring, reporting, maintaining and enforcing LUCs/ICs], and provisions for developing an [Operation and Maintenance Plan], [Five-Year Review Report], [Land Use/Institutional Control Implementation Plan], [Remedial Action Completion Report], [Site Closeout Report],[and others, as appropriate] are required components of remedy selection and the ROD. The [Component] acknowledges that US EPA maintains that without such specific provisions the remedy is not fully protective. It is the position of the [Component] that such provisions are not part of required remedy selection or the ROD; therefore, the [Component] has not identified these provisions as remedial components in this ROD. The [Component] has at attachment ___ included these disputed provisions; however, they are not thereby made a term, condition, provision or requirement of this ROD or the selected remedy, but are for purposes of illustration and information only. The [Component] acknowledges that, pursuant to 42 USC Sec. 9620(e)(4)(A) and 40 CFR Sec. 300.430(f)(4)(iii), the Administrator of the EPA has sole remedial action selection authority at Federal facilities on the NPL if EPA and the [Component] are unable to agree on remedy selection. It is EPA's position that the disputed provisions described above fall within the meaning of "remedy" and EPA's remedy selection authority. The [Component] expressly reserves its position that these disputed provisions do not fall with the meaning of "remedy" or EPA's remedy selection authority. The [Component] commits to subsequently revising this ROD, in accordance with the procedural requirements of CERCLA and the NCP, if (a) DoD subsequently determines and agrees programmatically to include such provisions as components of the remedy selected and the ROD, or (b) DoD is directed to include such provisions at the conclusion of a dispute resolution process involving EPA and [Langley Air Force Base or other installation, as appropriate]. The [Component] expressly reserves its right to invoke any applicable federal inter-agency dispute resolution process to resolve whether the specific provisions are within the scope of the EPA Administrator's authority to select remedies. The [Component] expressly acknowledges that by EPA signing and concurring with the remedy selected and identified by the [Component] in this ROD, EPA is not waiving or prejudicing its position that such provisions respecting [LUC/IC inspection, monitoring, reporting, maintenance and enforcement], and provisions for developing an [Operation and Maintenance Plan], [Five-Year Review Report], [Land Use/Institutional Control Implementation Plan], [Remedial Action Completion Report], [Site Closeout Report], [and others, as appropriate] are required components of the remedy selection process and the ROD and that without such provisions the remedy is not fully protective.

Transmittal letter forwarding Component signed ROD for EPA signature shall state:

(1) As lead agency, we must ensure the cleanup work at [installation] moves forward, and the only substantively disputed issue for this ROD is the section addressing supplemental land use control implementation and maintenance measures [and other post-ROD provisions, as appropriate].

(2) The [Component] acknowledges that US EPA maintains that without such specific provisions the remedy is not fully protective.

(3) The ROD signed by the [Component] satisfies all required statutory and regulatory (National Contingency Plan) requirements.

(4) The ROD also fully complies with the content requirements recommended by EPA in OSWER 9200.1-23P, July 1999 (Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents [We may particularly reference p. 6-59 on Institutional Controls, if we want to highlight that issue].

(5) The [Component], as lead agency, is committed to carrying through its statutory obligations under CERCLA and the NCP for implementing and maintaining the remedy (including any land use controls), carrying out five-year reviews where hazardous substances remain at levels above those allowing unrestricted use, and responding in any other way necessary to protect human health and the environment and comply with statutory and regulatory requirements under CERCLA.

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

JUN 4 2002

Honorable Marianne Lamont Horinko
Assistant Administrator
Office of Solid Waste and Emergency Response
United States Environmental Protection Agency
Ariel Rios Building, Mail Code 5101
1200 Pennsylvania, NW
Washington, DC 20460

Dear Ms. Horinko:

I am encouraged that the Air Force and Environmental Protection Agency (EPA) Region III are continuing to work positively and constructively towards resolution of post-Record of Decision (ROD) issues at Langley Air Force Base that will apply on a national level. While I am hopeful that a mutually acceptable approach will be reached, it will not happen in the in time to ensure execution of the Department of Defense's (DoD's) Fiscal Year 2002 cleanup requirements.

As you and I have discussed and agreed, cleanup needs to go forward. We can no longer keep cleanup on hold, particularly with end of the end of Fiscal Year 2002 in sight. DoD needs to move forward with cleanup activities where we have agreement on the underlying physical remedy while our agencies are working collaboratively to resolve the post-ROD issues. Therefore, I am now authorizing the DoD Components to move forward with cleanup where we have agreement on the underlying physical remedy.

As noted in my January 14, 2002 letter to you, a ROD is a necessary pre-condition to initiation of cleanup activities. Thus, I am authorizing DoD Components, where there is remedial consensus on the underlying physical remedy, to issue and execute RODs that will include a reservation noting the areas of disagreement. This ROD will be the basis for DoD Components to move forward with implementation of the undisputed portions of the remedy. It is my understanding that while EPA will not sign the ROD or concur with the remedy being final, Regions will document in a letter to the Component their consensus with the physical remedy. While we think this approach preserves both EPA and DoD positions, I anticipate that EPA regions may invoke formal dispute resolution for such RODs on an installation specific basis. While I believe invoking a formal dispute is unnecessary, if it does happen, I hope that EPA regions invoking such disputes will also stay the dispute, pending resolution of the disagreement at

Langley Air Force Base and the collaborative development of a consistent national approach by both our agencies.

Please feel free to call me at (703) 697-8080 on this matter, or have your staff call Mr. Kurt Kratz, my Cleanup Program Director, at (703) 697-5372 or Mr. Shah A. Choudhury, my action officer, at (703) 697-7475.

Very truly yours,

John Paul Woodley, Jr.
Assistant Deputy Under Secretary of Defense
(Environment)

cc:
DGC(E&I)
DASA(ESOH)
DASN(E)
DASAF(ESOH)
DLA-DSSE

ETHICS ADVISORY

If you can remember back to last fall when we conducted Annual Ethics Training, the "Do You Wanna Be an Ethics Millionaire?" game, we asked one of the contestants the question:

What is the maximum dollar amount of stock you can own in a company and still be allowed to participate in a government decision that affects the company?

A. $20
B. $300
C. $5000
D. $15,000

The contestant looked to the heavens, scratched his chin, and pondered. Still unsure, he used one of his valuable ethics life savers. He polled the audience, which in overwhelming numbers voted for the correct choice: C. $5000.

Effective 18 April 2002, $5000 no longer will be the correct answer. The correct answer will be: D. $15,000. Long awaited, Office of Govenment Ethics' (OGE) proposed regulatory change to raise the exemption amount for stock ownership has now been published as a final regulation that takes effect on 18 April 2002. For purposes of applying the exemption, the employee must aggregate his or her stock ownership with stock owned by someone whose financial interests are imputed to him or her--spouse and minor children.

OGE has also established an exemption amount for ownership of sector mutual funds. A sector mutual fund is a mutual fund that concentrates its investments in an industry, business, single country other than the United States, or bonds of a single State within the United States. The exemption amount for sector funds is $50,000. There already is a blanket exemption for diversified mutual funds. A diversified mutual fund is one that does not have a stated policy of concentrating its investments in any industry, business, single country other than the United Statees, or bonds of a single State within the United States.

Another exemption OGE has created permits an employee to act in a particular matter that affects an entity in which the employee owns securities that do not exceed $25,000, where the entity is not a party to the matter. This exemption is difficult to explain. The best way to explain it is to see the example OGE sets out in the regulation:

"A Food and Drug Administration advisory committee is asked to review a new drug application from Alpha Drug Co. for a new lung cancer drug. A member of the advisory committee owns $20,000 worth of stock in Mega Drug Co., which

manufactures the only similar lung cancer drug on the market. If approved, the Alpha Drug Co.'s drug would directly compete with drug sold by the Mega Drug Co., resulting in decreased sales of its lung cancer drug. The committee member may participate in the review of the new drug."

The exemption amounts for purposes of determining conflicts of interest and when an employee may participate in a particular matter are separate and distinct from what assets you must report on your OGE Form 450 or SF 278. The dollar thresholds for reporting financial interests in stocks and other securities, diversified mutual funds, and sector mutual funds are much lower than the exemption amounts. The OGE regulation on exemption amounts does not change the dollar thresholds for reporting financial interests.

Finally, Office of Command Counsel has reconstituted the Ethics Team. Besides me, the team members are:

John German
617-8082

MAJ Jennifer Schall
617-7572

COL David Howlett
617-0238

If you have questions about the subject matter of this Ethics Advisory or any other ethics question, do not hesitate to call. Also, I would appreciate your feedback on this advisory and your suggestions on what topics you would like to see in future advisories.

Robert H. Garfield
Associate Counsel for Ethics
617-8003

MEMORANDUM TO

SUBJECT: REQUEST FOR ETHICS/ADMINISTRATIVE LAW OPINION CONCERNING PROPRIETY OF ACCEPTANCE OF TIPS BY APPROPRIATED AND NON-APPROPRIATED PERSONNEL ENGAGED IN THE RESTAURANT BUSINESS ON A FEDERAL INSTALLATION

1. This memorandum is in response to your inquiry concerning the propriety of the acceptance of tips by either appropriated or non-appropriated fund employees working as bartenders at a restaurant on a federal installation. You have advised me that occasionally appropriated fund employees are required to substitute for, or otherwise assist, non-appropriated fund bartender employees who may be late, sick, on leave, or during periods of time when the bar is busy.

2. 18 U.S.C § 209 prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. 18 U.S.C. 209(a) states:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or
>
> Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> Shall be subject to the penalties set forth in section 216 of this title.

3. 18 U.S.C. §209 therefore prohibits the receipt of any compensation for services rendered and paid for by the U.S. government. 18 U.S.C. § 209 also prohibits the giving of compensation by an individual to an officer or employee of the executive branch of the U.S. government. Therefore, the issue is whether tips are prohibited on their face under

18 U.S.C. § 209, or other federal statutes permit employees to receive tips who are engaged in occupations that "customarily and regularly" involve tips as a portion of the overall wage compensation.

4. Tips have regularly and customarily been standard practice in the restaurant industry for years. The Federal Fair Labor Standards Act sets forth specific regulations concerning the federal minimum wage as it applies to occupations where compensation in part is derived from tips. State minimum wage statutes create exceptions to calculations for determining the minimum hourly wage for restaurant workers, in conformity with regulations promulgated under the Federal Fair Labor Standards Act, 29 U.S.C. 201 et seq. Tips therefore are clearly considered a customary and ordinary manner of compensation for certain types of occupations. These minimum hourly wage exceptions ordinarily will apply to waiters/waitresses, bus boys, and bartenders in the restaurant business.

5. Tips paid to workers are considered taxable income in accordance with applicable IRS regulations, and are required to be declared on an individual's federal and state income tax return. Therefore, the Internal Revenue Code clearly considers tips given to restaurant workers as taxable income, since it is considered wage compensation for services rendered. Whether tips are considered taxable income for the purposes of the Internal Revenue Code cannot necessarily be interpreted as a blanket interpretation that tip income constitutes a "contribution to or supplementation of salary" within the meaning of 18 U.S.C. § 209, as the federal government is also required to comply with the Federal Fair Labor Standards Act.

6. The Federal Fair Labor Standards Act has promulgated specific regulations concerning employees who are engaged in occupations that "customarily and regularly" receive tips as income. These statutes therefore must be interpreted in conjunction with each other, as regulations involving tipping of federal employees have not been promulgated under 18 U.S.C. § 209. The legal issue therefore is whether 18 U.S.C. §209 supersedes application of compliance by the federal government with the Fair Labor Standards Act, the promulgated regulations therein, and case law.

The Federal Fair Labor Standards Act requires that employees of the U.S. government be paid a compensatory hourly wage. The FFLSA and implementing regulations permit an employer to calculate tips as part of the compensation paid to employees for the purposes of complying with the federal minimum wage law. The FFLSA does not require employers to calculate tips as part of the minimum wage, as employers have the option to pay the federal minimum wage, and permit employees to retain tips. However, it is a standard practice in the restaurant industry for employers to calculate tips as part of the hourly minimum wage. The Federal government currently does not request that non-appropriated fund employees report their tips for the purposes of calculating the minimum wage credit under FFLSA.

7. For any non-appropriated fund employees who are paid on a basis where tips are calculated by the federal government as a credit toward the federal minimum wage, the employee would be permitted to retain any tips received by any customer. Receipt of tips under this factual scenario involves the employee having borne the burden of not receiving the standard minimum wage, but having their tips included as part of the minimum wage compensation for purposes of the employer's compliance with the FFLSA. Federal regulations promulgated under the FFLSA specifically addresses "tipped employees". The Department of Labor thus recognized that compensation for labor services in certain occupations customarily and regularly involved tips for the purposes of determining whether an employee was receiving a minimum wage in conformity with state and federal law.

8. The ethical issue is more complex where a non-appropriated fund employee receives the full minimum wage from the employer, but yet also receives tips to supplement that minimum wage. In such a scenario, the employer has voluntarily opted to pay the minimum wage to the employee and not calculate tips as part of the employer wage credit under the FFLSA. Apparently, the federal government has voluntarily opted under the FFLSA not to calculate tips as part of the minimum wage for non-appropriated fund employees working as waiters, bartenders and busboys. However, the voluntary decision by the U.S. government not to collect tip income information for the FFLSA wage credit cannot reasonably be interpreted to establish that non-appropriated fund employees were never expected to be offered, or to retain, tips in occupations that customarily and ordinarily involve such a form of compensation. In fact, the undersigned Ethics Counselor has never personally observed any dining club or restaurant establishment that expressly prohibited tips as a part of their daily operations.

9. 29 C.F.R. §531.50(a) provides the general rule for employers who choose to calculate tips for the purpose of minimum wage compliance:

> With respect to tipped employees, section 3(m) provides: In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (whether himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount such employee by his employer shall be deemed to have been increased by such lesser amount.

10. A "tipped employee" is defined in section 3(t) of the FFLSA as "any employee engaged in an occupation in which he customarily and regularly receives more than $20 a

month in tips." However, 29 U.S.C. § 203(t) was modified in 1977 to define a "tipped employee" as one who customarily and regularly receives more than $30.00 a month in tips. 29 C.F.R. §531.52 defines "tip" as:

> "…a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally he has the right to determine who shall be the recipient of his gratuity. In the absence of any agreement to the contract between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer. Only tips actually received by an employee as money belonging to him which he may use as he chooses free of any control by the employer, may be counted in determining whether he is a "tipped employee" within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips. (Emphasis added).

11. 29 U.S.C. § 203(e)(2)(A) defines "employee" as:

> "any individual employed by the Government of the United States – (i) as a civilian in the military departments……. and (iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,…."

Therefore, both appropriated fund and non-appropriated fund employees are considered as employees under the Fair Labor Standards Act. Thus, the FFLSA by federal statute and regulations promulgated thereunder included federal employees as possibly being in a type of occupation that "customarily and regularly" receives tips in excess of $30.00 per month. 29 U.S.C. 203(t); 29 C.F.R. § 531.57.

12. Case law interpreting the Fair Labor Standards Act, 29 U.S.C. 201 et seq., concerning tips paid to workers generally accepts the principle that in the absence of an express agreement between the employer and the employee, tips belong to the employee to whom they were left, and the employer was required to pay his tipped employees at least one-half of applicable minimum wage in addition to tips left them by customers. Richard v. Marriott Corp., 549 F. 2d 303, cert. denied, 433 U.S. 915 (4th Cir. 1977); Barcelona v. Tiffany English Pub, Inc., 597 F.2d 464 (5th Cir. 1979). An agreement under which employees had to turn in all monies collected as tips and be reimbursed just up to the amount that would equal minimum wage was held to violate the Fair Labor Standards Act, which limits amount by which employer can reduce its minimum wage obligation by treating employees tips as wages. Wright v. U-Let-Us Skycap Services, Inc., 648 F. Supp. 1216 (1986).

In Dole v. Continental Cuisine, Inc., 751 F. Supp. 799 (E.D. Ark. 1990), the court held that participation by a restaurant maitre d' in a restaurant tip pool did not deprive the restaurant of its entitlement to the minimum wage tip credit under the Fair Labor Standards Act; the maitre d' was not an employer and was the type of employee who would customarily receive tips. The court in Elkins v. Showcase, Inc., 704 P.2d 977 (Kan. 1985), held that bartenders whose functions were performed away from customers were "non-service" bartenders who did not "customarily and regularly" receive tips with the meaning of the Fair Labor Standards Act. Thus, payment of 40 percent of tip pool to "non-service" bartenders was held to violate the Act.

Thus, the Federal Fair Labor Standards Act, the regulations promulgated therein, and case law, establish that in absence of an agreement between the employer and the employee to the contrary, tips given by customers to an employee are the property of the employee. You have indicated to me that currently there is no agreement between the federal government and it's non-appropriated fund employees that all tips belong to the federal government. In the absence of such an agreement, it appears that the government's responsibility to comply with the FFLSA requires that any tip provided to an employee whose occupation would "customarily and regularly" involve the receipt of tips is entitled to retain that compensation. 29 C.F.R. §531.57. Non-appropriated fund employees who customarily and regularly receive tips within the definition of 29 C.F.R. §531.27 would include waiters/waitresses, bartenders, and busboys who regularly and customarily deal with the general public as their primary employment duties. Such tips are taxable income, and the Ethics Guidelines require all federal employees to comply with proper filing of federal and state income tax returns.

14. Restaurant Managers. The primary duties and obligations of appropriated fund employees such as managers and assistant managers would not fall within the definition of an occupation that "customarily and regularly" receives tips. Customers do not "customarily and regularly" tip the club manager. While it is certainly foreseeable that managers/assistant managers in an emergency or unanticipated labor shortage may be required to "fill in" on behalf of a bartender or waiter, it cannot be said that such duties are customary and regular. Furthermore, the duties and obligations of club managers/assistant managers include management, supervisory, and operational control over club operations including relationships with government contractors, suppliers, and assessing performance of subordinate employees and non-appropriated fund employees. Therefore, as the ordinary, customary and regular duties of an office manager or assistant manager of a restaurant would not involve or contemplate the receipt of tips, such a payment would fall outside the definition of 29 C.F.R. §531.27.

15. It is clear that Congressional intent under 18 U.S.C. § 209(a) would prohibit federal employees from receiving additional compensation where their duties would not "ordinarily or customarily" involve the receipt of tips as compensation. Therefore, appropriated fund employees whose duties and obligations within the restaurant trade do

not "customarily and regularly" involve the receipt of tips would be prohibited from soliciting or receiving any tip as additional compensation under 18 U.S.C. § 209.

16. Consequently, restaurant managers or assistant managers who are offered a tip during the occasional and infrequent times they operate as a bartender, waiter, or similar type of duties would be required to either refuse the tip, or accept the tip on behalf of the employees who customarily and regularly receive tips within the meaning of 29 C.F.R.§ 531.57 under a tip-pooling agreement between those employees. The Ethics Guidelines require that federal employees avoid even the appearance of impropriety. 5 C.F.R. §2635.502. Restaurant managers and assistant managers exercise management control over issues involving government contracting, employee supervision, and business operations. Restaurant managers also act as custodians of public money within the purview of the Miscellaneous Receipts Act, 31 U.S.C. § 3302. These integral and primary duties and responsibilities obviously place restaurant managers in an occupational position that does not "customarily and regularly" involve tips as compensation.

17. Volunteers who are tipped. Individuals who volunteer to work for tips are not federal employees within the meaning of the Fair Labor Standards Act or the Dual Compensation Act. Therefore, the Joint Ethics Regulations would not apply to these employees. Whether a federal instrumentality should develop and encourage volunteers to perform labor services as a pattern or practice is an issue outside the scope of this Ethics Opinion.

18. Policy of Charging Tips for Large Parties. Some private restaurants as an industry practice charge an established percentage of the bill for large parties over a specified number of people. Currently, the percentage ordinarily charged varies between fifteen and twenty percent. Many restaurants initiated this practice to ensure that the waiters and waitresses would receive a guaranteed tip for serving a large number of customers. Once again, the pertinent regulation under the Fair Labor Standards Act defines "tip" as:

> "…a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally he has the right to determine who shall be the recipient of his gratuity. In the absence of any agreement to the contract between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer. Only tips actually received by an employee as money belonging to him which he may use as he chooses free of any control by the employer, may be counted in determining whether he is a "tipped employee" within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips. (Emphasis added). 29 C.F.R. § 531.52.

While such a practice does not currently exist here, implementing a policy to impose tips on large groups would not be permitted under the Ethics Guidelines. Such a policy would impose a contractual condition prior to any customer receiving service. Therefore, the unilateral imposition of a contractual condition that the restaurant operation imposes upon the customer to pay a tip would not conform to the legal definition of a "tip" within the meaning of the Fair Labor Standards Act. Tips are voluntary, and initiating such a practice would clearly eliminate the voluntary character of any tip given by a customer. Furthermore, as such a policy would impose a charge on any customer, any "tip" charged to the customer could not possibly be considered a gift under the Ethics Rules. Additionally, the practice of recommending that a tip be given, or recommending a certain percentage of the bill be provided as a tip would constitute solicitation of a gift of money, and thus would be also prohibited under the Ethics Guidelines.

19. Federal Fair Labor Standards Act v. Dual Compensation Act. The Federal Fair Labor Standards Act and the Federal Dual Compensation Act must be construed, if possible, as consistent with each other. The Federal Fair Labor Standards Act clearly was intended to address in part occupations involving tips, and includes both appropriated and non-appropriated fund employees within it's application. Settled rules of statutory construction require that when faced with potentially conflicting statutes, the proper course is to interpret them harmoniously to eliminate any conflict. Rodgers v. United States, 185 U.S. 83, 87-89 (1902); United States v. Borden Co., 308 U.S. 188, 198 (1939); Bulova Watch Co. v. United States, 365 US. 753, 758 (1961); Radzanower v. Touche Ross & Co., 426 U.S. 148, 155, 48 L.Ed. 2d 540, 96 S. Ct. 1989 (1976). Therefore, reasonable statutory construction would dictate that the Federal Fair Labor Standards Act, the "tip" regulations promulgated therein and relevant court decisions specifically requires that tips are the property of the employee, in the absence of an agreement between the employee and a third party, where the employee's occupation is one which "customarily and regularly" involves tips as a portion of the wage compensation. The Dual Compensation Act would prohibit the receipt of tips by any federal employee whose occupational duties would not "customarily and regularly" involve tips as a portion of the employee's wage compensation.

20. Summary. Employees whose occupational duties are of the type that would "customarily and regularly" receive tips are entitled to retain that income under the Fair Labor Standards Act, in the absence of an agreement between the government and employee that all tips are to be reported for purposes of calculating the employer minimum wage credit under the FFSLA. Both appropriated fund and non-appropriated fund employees whose primary occupational duties do not customarily and regularly involve tips, or involve government contracting, restaurant management, supervision of employees or other fiduciary duties are prohibited under 18 U.S.C. § 209 from soliciting or accepting tips as a "contribution to or supplementation of salary". Such occupational

duties would not “customarily and regularly” involve the receipt of tips within the regulatory requirements of 29 C.F.R. § 531.57 promulgated pursuant to the Fair Labor Standards Act.

21. I appreciate your request for an Ethics Opinion concerning this matter. Should you have any further questions, please do not hesitate to contact me at your earliest convenience at _____.

BRUCE D. ENSOR
Ethics Counselor

Questions? Please contact Corrin Gee at 800.253.4183 x78236 or Rachel Hankins at x78258

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FINDING PEOPLE

Finding People By Name

Source: ALLFIND and/or EZFIND Combined Person Locator Nationwide
File Path:Public Records; Person Locator
Enter: **john /3 adams**

- If you get a "this search will retrieve more than 1000 documents" notice, try the search again, this time adding a state or city:
  Enter: **john /3 adams and VA**

Narrowing a Search Using FOCUS

Still have too many documents to search through? Use the FOCUS command to narrow your search results to a given city or street. To further narrow down the above search:
Click: **Focus ™—Narrow Results**

- To change your Focus, click on your browser's "back" button. Click "back" again to get completely out.

Expanding a Search

- You can use OR to expand your search among several cites and states:

Enter: **john /3 adams and VA or MD or los angeles**

Using the "!" and the "*"

You can use the exclamation mark to look for any ending of a word; the asterisk will replace one letter at a time:
Enter: **pat! /3 o'bri*n**

- This will find Pat, Patrick, Patricia, Patty, Patrice, etc. as well as O'Brian, O'Brien, etc.

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Not sure if the subject has an *s* or '*s* at the end? (e.g., Starbucks or Starbuck's). Replace either ending with the "**!**" .
Enter: **Starbuck!**

Searching Using Middle Names

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Enter: **john /3 q or quincy /3 adams**

- Middle names are often omitted or listed incorrectly; if you don't find the person this way, leave off the middle name or initial and try again.

Finding People By Address

To find who lives at 12345 North Maple Street:
Enter: **12345 /3 maple /3 arlington**

- DO NOT enter terms like "North" or "street"; they're sometimes listed incorrectly.
- This search will also find people who list this address as their former address.

Other Types Of Searches:

***Social Security Number*:**

Enter: **123-45-6789**

Phone #:

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- Make sure to leave off the area code; they change regularly.

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By Name

Source: Postal Abbrev. Of the State you want to search (i.e. VA Deed Transfer & Tax Assessor)
File Path:Public Records; Real Property Records; Combined Deed Transfer & Tax Assessor
Enter: **john /3 adams**

By Address

Enter: **123 /3 maple /3 arlington**

- You can also find every address in a given area:

  Enter: **123** /3 maple /3 arlington**
- This will list every house on Maple street with 123 as the first three digits of the address; you can use more or fewer asterisks to widen/narrow your search.

FINDING BUSINESSES AND THEIR REGISTERED AGENTS

The INCORP library lists Secretary of State filings, DBAs (doing business as) and limited partnership filings for most states.

By Company Name

Source: WA Business & Corporation Information

File Path:Public Records; Business & Corporation Information

Enter: **name-1(starbucks)**

- Using "name" in front of your search limits the search to just the name and address section of your document.

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Enter: **larry /3 miller**

FINDING LEGAL PROCEEDINGS

For Court Docket Listings:

Source: California Combined Civil Court Filings From Superior Courts

File Path:Public Records; Civil & Criminal Filings; Civil & Criminal Filings – Selected States; California

Enter: **name(san diego and rider)**

- Again, the "name" designation narrows down the search to just named parties.

For Bankruptcies:

Source: VA Bankruptcy Filings

File Path:Public Records; Bankruptcy Filings

Enter: **john /3 adams**

- You can also search for bankruptcies nation- wide; use the **Combined Bankruptcy** filing source.
- The **Bankruptcy Filings** source will list the petitioner's social security number beneath their name.

Judgments & Liens;

Library: DC Judgment & Lien Filings

File: Public Records;

Enter: **john /3 adams**

- The LIENS library is also a very good place to find the social security number of a party.
- UCC Article 9 liens are always worth checking:

Source: Virginia Uniform Commercial Code Lien Filings

File Path:Public Records; Uniform Commercial Code Lien Filings

Enter: **john /3 adams**

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This combined search will run in most Public Records Sources simultaneously:

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Enter: **123 /3 maple /3 arlington**

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The NEWS library contains about 19,000 news sources, including news transcripts from CNN, ABC and NBC.

Source: News Group File – 90 Days

File Path:News

Enter: **army materiel command**

- If you would like to narrow your search down to just headlines:

Enter: **headline(army materiel command)**

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